

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7076-7

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET No. 75-7076

THE ROBERT STIGWOOD GROUP LIMITED, LEEDS MUSIC
LIMITED and LEEDS MUSIC CORPORATION,
Plaintiffs-Appellants,
Cross-Appellees,

v.

JOHN T. O'REILLY, JACK COYNE and ROBERT CASSIDY,
Defendants-Appellees,
Cross-Appellants.

DOCKET No. 75-7077

TRACK MUSIC, INC., FABULOUS MUSIC LTD.
and NEW IKON, LTD.,
Plaintiffs-Appellants,
Cross-Appellees,

v.

CONTEMPORARY MISSION, INC., JOHN T. O'REILLY, JACK
COYNE, PATRICK BERKERY, RICHARD PALMESE, JOE DE VITO,
and DOROTHY LERNER,
Defendants-Appellees,
Cross-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOINT APPENDIX

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T. O'Reilly, et al.*

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Relevant Docket Entries.

(Record Document A)

*The Robert Stigwood Group Limited, et al. v.
John T. O'Reilly, et al.*

May	5, 1972	Verified Complaint, filed. (ex. 1-6)
June	1, 1972	Answer, filed by the Defendants.
July	25, 1972	Ruling on Plaintiffs' Motion for a Preliminary Injunction, entered. Ordered that the Defendants are enjoined from infringing copyrights of plaintiffs, from performing, etc. of work <i>Jesus Christ Superstar</i> and from utilizing any advertisements which refer to <i>Jesus Christ Superstar</i> . ZAMPANO, J.
August	1, 1972	Notice of Appeal, filed by defendants.
June	25, 1973	Attested copy of JUDGMENT of Court of Appeals affirming judgment of District Court received from Clerk, U.S.C.A., and filed. (Fusaro, C.) (M-6/25/73) ". . . Judgment of said District Court be and it hereby is affirmed on the authority of Robert Stigwood Group Ltd. v. Sperber, 457 F.2d 50 (2nd Cir. 1972) and Robert Stigwood Group Ltd. v. Hurwitz, 462 F. 2d 910 (2nd Cir. 1972). In addition, the argument that the performances fall within the religious works exemption of 17 U.S.C. § 104 is frivolous."
August	7, '73	Motion for Summary Judgment and Notice of Motion, filed, by plaintiffs.
August	7, '73	Affidavit in Support of Plaintiffs' Motion for Summary Judgment, filed.
August	7, '73	Plaintiffs' Memorandum of Law submitted in support of Motion for Summary Judgment.

Relevant Docket Entries.

- October 9, '73 Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, filed.
- October 12, '73 Plaintiffs' Reply Memorandum of Law Submitted in Support of Motion for Summary Judgment, filed.
- October 12, '73 Statement of Facts as to Which Plaintiffs Contend there is no Genuine Issue to be Tried Pursuant to Local Rule 10 (a) 3, filed.
- October 15, '73 Per Motion Calendar of Zampano, J.: Plaintiffs' Motion for Summary Judgment: Decision Reserved.
- November 13, '74 Ruling on Defendant Robert Cassidy's Motion to Dismiss, filed and entered. Denied. ZAMPANO, J.
- November 13, '74 Ruling on Plaintiffs' Motion for Summary Judgment, filed and entered. ZAMPANO, J. M-11/13/74. Granted.
- November 15, '74 Judgment, filed and entered. Ordered that judgment be entered in favor of the plaintiff, as follows: 1. Defendants shall pay to the plaintiffs the sum of \$22,800 in damages for infringements of the rock opera "Jesus Christ Superstar"; 2. The defendants shall pay to the plaintiffs the sum of \$4,700 as a reasonable attorney's fee; 3. The defendants shall pay the costs of this suit as determined by the Clerk of this Court.
- November 26, '74 Plaintiffs' Motion for Reconsideration of Rulings and Amendment of Judgment, together with Notice of Motion, filed.

Relevant Docket Entries.

- November 26, '74 Plaintiffs' Memorandum of Law Submitted in Support of Their Motion for Reconsideration of Rulings on Plaintiffs' Motion for Summary Judgment and Amendment of Judgment Pursuant to Rule 59(e) F.R.C.P., filed.
- December 19, '74 Ruling on Plaintiffs' Motion for Reconsideration, filed and entered. Ordered that Motion to amend the Judgment to include permanent injunctive relief is granted. The judgment is amended to add: 4. The preliminary injunction issued by this Court on July 24, 1972 is hereby made permanent. The plaintiffs application to increase the amount of damages from \$22,800 to \$58,000 is denied. Zampano, J.
- December 26, 1974 Amended Judgment, filed and entered. Ordered, Adjudged and Decreed that 1. The motion to amend the judgment to include permanent injunctive relief is *granted*. The judgment is amended to add the following paragraph: 4. The preliminary injunction issued by this Court on July 24, 1972 is hereby made permanent. 2. The plaintiffs' application to increase the amount of damages from \$22,800 to \$58,000 is *denied*. Under all the circumstances, the Court is of the opinion that the sum awarded in this case is fair, reasonable, and just.
- January 23, 1975 Notice of Appeal, filed by plaintiffs.
- January 27, 1975 Notice of Appeal from final judgment, filed by defendants.

Verified Complaint.

(Record Document 1)

Plaintiffs, by their attorneys, Clancy, Kenny & Ford, respectfully allege:

FIRST CLAIM

1. This claim arises under the Act of March 4, 1909, c. 320, 35 Stat. 1075, et seq., Title 17 Federal Copyright Act, U.S.C. Section 1 et seq. and the amendments thereto, as codified and enacted into positive law by the Act of July 30, 1947, c. 391, 61 Stat. 652, and the amendments thereto, and the Act of June 25, 1948, c. 646, 62 Stat. 931, Title 28 U.S.C. Sections 1338(a) and (b), as hereinafter more fully appears.

2. Plaintiff The Robert Stigwood Group Limited (hereinafter referred to as "STIGWOOD") is a corporation duly organized and existing under the laws of the United Kingdom.

3. Plaintiff Leeds Music Limited (hereinafter referred to as "LEEDS ENGLAND") is a corporation duly organized and existing under the laws of the United Kingdom.

4. Plaintiff Leeds Music Corporation (hereinafter referred to as "LEEDS") is a corporation duly organized and existing under the laws of New York.

5. Upon information and belief, defendants John T. O'Reilly, Jack Coyne and "JOHN" Cassidy reside in this district and are doing business as The International Rock Opera Company.

6. Prior to May 1, 1971, Timothy Rice and Andrew Lloyd Webber, who then were and ever since have been citizens of the United Kingdom, created and wrote an

Verified Complaint.

original dramatico-musical work entitled "JESUS CHRIST SUPERSTAR."

7. Said dramatico-musical work consists of dramatico-musical material wholly original with said Timothy Rice and Andrew Lloyd Webber, including the portions thereof respectively entitled "Overture", "Heaven On Their Minds", "Whats The Buzz/Strange Things Mystifying", "Everything's Alright", "This Jesus Must Die", "Hosanna", "Simon Zealotes/Poor Jerusalem", "Pilate's Dream", "The Temple", "I Don't Know How To Love Him", "Damned For All Time/Blood Money", "The Last Supper", "Gethsemane (I Only Want To Say)", "The Arrest", "Peter's Denial", "Pilate and Christ", "King Herod's Song", "Judas' Death", "Trial Before Pilate (including the 39 lashes)", "Superstar", "Crucifixion", and "John Nineteen Forty-One", all of which is copyrightable subject matter under the laws of the United States.

8. Prior to May 1, 1971, said Timothy Rice and Andrew Lloyd Webber duly assigned to plaintiff Leeds England, a music publisher, said dramatico-musical work exclusive of "King Herod's Song" and the right to secure copyright therefor in the name of said plaintiff.

9. At various times prior to May 1, 1971, plaintiff Leeds England duly complied in all respects with the said Act of March 4, 1909, and the amendments thereto, known as the Copyright Law, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyrights in said dramatico-musical work, exclusive of "King Herod's Song", and received from the Register of Copyrights certificates of registration therefor, respectively dated and identified as follows:

- (1) "SUPERSTAR (From the Rock Opera 'Jesus Christ') December 5, 1969, Class E, No. Eu 151211;

Verified Complaint.

(2) "JOHN NINETEEN FORTY-ONE (From the rock Opera 'Jesus Christ') " December 5, 1969, Class E, No. Eu 151212;

(3) "I DON'T KNOW HOW TO LOVE HIM (From the Rock Opera 'Jesus Christ') " October 30, 1970, Class E, No. Eu 219295;

(4) "JESUS CHRIST SUPERSTAR, A ROCK OPERA (Musical Excerpts Complete Libretto) " December 21, 1970, Class D, No. Dp 7618;

(5) "JESUS CHRIST SUPERSTAR, A ROCK OPERA (Libretto) " February 24, 1971, Class D, No. Df 2066 (Additional Words);

(6) "JESUS CHRIST SUPERSTAR (Vocal Score) " April 20, 1971, Class D, No. Du 79703.

10. Annexed hereto and marked respectively Exhibits 1-6 are true copies of said certificates of registration.

11. Prior to May 1, 1971 plaintiff Leeds England duly assigned to plaintiff Leeds the rights for the United States under said copyrights in said dramatico-musical work and all segments thereof, except "King Herod's Song."

12. Prior to the date hereof, plaintiff Stigwood acquired by assignment the professional stage rights for the United States under the copyrights in said dramatico-musical work, including the segment entitled "King Herod's Song" which was duly copyrighted by Norrie Paramor Music Ltd., of the United Kingdom.

13. At all times relevant hereto, plaintiffs have duly complied with all of the pertinent provisions of the Copyright Act, and all other laws governing copyright.

Verified Complaint.

14. At all times relevant hereto, plaintiff Leeds England has been and still is the sole proprietor of all rights, title and interest in and to the copyrights in said dramatico-musical work and all segments thereof exclusive of "King Herod's Song"; plaintiff Leeds has been and still is possessed of all rights under said copyrights, for the United States, exclusive of "King Herod's Song"; and plaintiff Stigwood has been and still is possessed of all professional stage rights for the United States under said copyrights.

15. After May 1, 1971 defendants presented and performed, and caused to be performed, and are preparing to perform and cause to be performed, and intend to perform and cause to be performed, in various parts of the United States, said dramatico-musical work and the segments thereof in direct violation of the copyrights of plaintiff Leeds England and the rights of plaintiffs Leeds and Stigwood thereunder.

16. By reason of the foregoing, the defendants are infringing the respective copyrights in said dramatico-musical work and interfering with the said rights of plaintiffs thereunder.

17. Plaintiffs have notified defendants in writing that their performances of said dramatico-musical work will infringe said copyrights, and interfere with said rights of plaintiffs, and defendants have refused to discontinue their unlawful acts.

18. Plaintiffs have no adequate remedy at law.

SECOND CLAIM

19. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "2" through "18" of this

Verified Complaint.

complaint. Jurisdiction arises under Title 28 U.S.C., § 1338(b).

20. Plaintiffs have engaged in the widespread exploitation of the rights under the copyrights in said dramatico-musical work, including through sales of more than 3 million complete recordings of performances thereof, made and sold by MCA Records Inc. under the label name "DECCA"; through the widespread presentation in the United States of authorized performances thereof entitled "JESUS CHRIST SUPERSTAR"; and through the renowned legitimate theatre presentations thereof on Broadway in New York, entitled "JESUS CHRIST SUPERSTAR".

21. By reason of the widespread exploitation of said dramatico-musical work, and the enormous public interest therein, said dramatico-musical work has become known in the trade and to the public as "SUPERSTAR", the title of its most popular segment.

22. Subsequent thereto, defendants adopted and engaged in (a), promoting, producing, advertising and scheduling performances of said dramatico-musical work under the title "JESUS CHRIST SUPERSTAR" and "SUPERSTAR", to create a false impression of authority from plaintiffs, thereby engaging in unfair trade practices and unfair competition against plaintiffs to plaintiffs' irreparable damage.

THIRD CLAIM

23. Plaintiffs repeat and reallege each and every allegation in paragraphs "2" through "22" of this complaint. Jurisdiction arises under Title 28 U.S.C. § 1338(a).

24. Defendants have used in connection with their said acts a false designation of origin and a false description and

Verified Complaint.

representation thereof in violation of Section 43(a) of the Lanham Act, Title 15, U.S.C., § 1125(a), to plaintiffs' irreparable damage.

WHEREFORE, plaintiffs demand:

(1) That each of defendants, their agents and servants, and all parties acting in concert with defendants, be enjoined during the pendency of this action and permanently from (a) infringing said copyrights of plaintiff Leeds England, and interfering with the rights of plaintiffs Leeds and Stigwood thereunder in any manner; (b) performing, contracting for, promoting, advertising, publicizing, contributing to, furthering, participating in or in any way aiding, assisting or abetting performances of the overall copyrighted dramatico-musical work entitled "JESUS CHRIST SUPERSTAR, A Rock Opera", or segments thereof; (c) utilizing, or permitting the use of, any advertisements, publicity or representations which refer to "JESUS CHRIST SUPERSTAR" or any segment thereof including "SUPERSTAR", directly or indirectly, in conjunction with any performances or productions of said copyrighted dramatico-musical work, or any segment thereof; (d) performing or presenting any performances whenever the advertising or publicity therefor refers to "JESUS CHRIST SUPERSTAR" or any segments thereof including "SUPERSTAR"; and (e) utilizing or permitting the use of the name "The International Rock Opera Company" or any other false designations of origin, descriptions or representations.

(2) That each of defendants be required (a) to account respectively, for all gains, profits and advantages derived by defendants from each of their acts of unfair trade practice and copyright infringement; (b) to pay to plaintiffs such damages as plaintiffs have sustained in consequence of each of defendants' infringements of said copyrights, or such damages as to the Court shall appear proper within

Verified Complaint.

the provisions of the Copyright Law, and (c) to pay to plaintiffs such damages as plaintiffs have suffered as a result of each of defendants' unfair trade practices.

(3) That each of defendants be required to deliver up to be impounded during the pendency of this action all copies of said copyrighted dramatico-musical work, or any part thereof, intended for use or used in performances thereof; all advertising, promotional items or other material referring thereto; and all other means for presenting infringing performances of said dramatico-musical work or any part thereof.

(4) That defendants pay to plaintiffs the cost of this action, including a reasonable attorney's fee to be allowed to plaintiffs by the Court, pursuant to § 116 of the Copyright Law.

(5) That plaintiffs have such other and further relief as to the Court may seem just.

[Exhibits 1-6 are copies of the certificates of copyright registration referred to in the verified complaint.]

Answer.

(Record Document 12)

Defendants hereby answer the separate complaints served upon them as follows:

FIRST CLAIM

1. Admitted.

2. through 4. Defendants are without information sufficient to form a belief, and, therefore, deny the allegations of paragraphs two, three and four of the Complaint.

5. Defendants admit that they reside in this district, but deny that they are "doing business". Defendants O'Reilly and Coyne admit performing with and participating in the activities of "The International Rock Opera Company", but defendant Cassidy denies that he has participated in the activities of "The International Rock Opera Company".

6. Defendants are without information sufficient to form a belief, and, therefore, deny the allegations of paragraph six of the Complaint.

7. Denied.

8. through 14. Defendants are without information sufficient to form a belief, and, therefore, deny the allegations of paragraphs eight, nine, ten, eleven, twelve, thirteen and fourteen of the Complaint.

15. Defendant Cassidy denies the allegations of paragraph fifteen of the Complaint in its entirety. Defendants O'Reilly and Coyne admit that they have participated in the presentation and performance of a work under the title

Answer.

"Jesus Christ Superstar" in various parts of the United States, but deny each and every other allegation in paragraph fifteen of the Complaint.

16. Denied.

17. Defendant Cassidy denies the allegations of paragraph seventeen of the Complaint in its entirety. Defendants O'Reilly and Coyne deny that they have either committed or refused to discontinue any unlawful acts, but admit the remaining allegations of paragraph seventeen of the Complaint.

18. Defendants are without information sufficient to form a belief, and, therefore, deny the allegations of paragraph eighteen.

SECOND CLAIM

19. Defendants repeat each and every answer contained in paragraphs two through eighteen of the Answer. Defendants admit jurisdiction under 28 U.S.C. § 1338(b).

20. Defendants are without information sufficient to form a belief, and, therefore, deny the allegations of paragraph twenty of the Complaint.

21. Denied.

22. Defendant Cassidy denies the allegations of paragraph twenty-two of the Complaint in its entirety. Defendants O'Reilly and Coyne admit that they have engaged in promoting, producing, advertising and scheduling performances of a work under the titles "Jesus Christ Superstar" and "Superstar", but deny all the remaining allegations of paragraph twenty-two of the Complaint.

Answer.

THIRD CLAIM

23. Defendants repeat each and every answer set forth in paragraphs two through twenty-two of this Answer. Defendants admit jurisdiction under 28 U.S.C. § 1338(a).

24. Denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense

25. Defendants hereby repeat the defenses made in paragraphs one through twenty-four.

26. The application of the United States copyright law to prevent defendants from performing the works in question would violate the First Amendment to the Constitution of the United States, in that it would prevent defendants from freely exercising their religion.

Second Affirmative Defense

27. Defendants hereby repeat the defenses made in paragraphs one through twenty-six.

28. Defendants' performances are free from the application of the copyright law because they are the performances of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, and the performances are given for charitable or educational purposes and not for profit.

Plaintiffs' Motion for Summary Judgment.

Third Affirmative Defense

29. Defendants hereby repeat the defenses made in paragraphs one through twenty-eight.

30. The use which is made of the works in question is fair use.

Dated: May 30, 1972.

Plaintiffs' Motion for Summary Judgment.

(RECORD DOCUMENT 27)

Upon the annexed affidavit of Robert C. Osterberg, plaintiffs move this Court for an order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment in favor of plaintiffs and against defendants, awarding plaintiffs (a) statutory damages in the total amount of \$90,000, pursuant to Section 101(b) of the Copyright Act (17 U.S.C., § 101(b)); (b) the costs of this action, including a reasonable attorney's fee in the amount of \$30,000, pursuant to Section 116 of the Copyright Act (17 U.S.C., § 116); and (c) a permanent injunction with the same injunctive relief as contained in the preliminary injunction entered herein, pursuant to Section 101(a) of the Copyright Act (17 U.S.C., § 101(a)); all on the ground that there is no genuine issue as to any material fact concerning the liability of said defendants herein, and that plaintiffs are entitled to a judgment against said defendants as aforesaid as a matter of law.

Dated: New York, New York, July 31, 1973.

**Affidavit in Support of Plaintiffs' Motion for
Summary Judgment.**

(RECORD DOCUMENT 28)

ROBERT C. OSTERBERG, being duly sworn, deposes and says:

1. I am a partner in the New York City law firm of Abeles Clark and Osterberg, and an attorney for plaintiffs herein. This affidavit is submitted in support of plaintiffs' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, including an award of reasonable attorney's fees pursuant to Section 116 of the Copyright Act (17 U.S.C., § 116). It is respectfully submitted that, as hereinafter more fully appears, there is no genuine issue of any material fact and plaintiffs are entitled to judgment as a matter of law.

2. This action is for copyright infringement arising out of the unauthorized uses of 6 separately copyrighted works in public performances of the rock opera entitled "JESUS CHRIST SUPERSTAR". The action was commenced by the filing of the verified complaint on May 5, 1972, together with an application for a temporary restraining order and preliminary injunction, supported by the affidavit of Peter Brown, sworn to May 4, 1972. A temporary restraining order was entered on May 5, 1972 and the hearing of plaintiffs' application for a preliminary injunction was set for May 15, 1972, at which time defendants appeared in opposition thereto. Evidentiary hearings on plaintiffs' application for a preliminary injunction were held on May 15, and 23, June 1, 2, 15 and 16, and July 26, 1972. On July 25, 1972, the court granted plaintiffs' motion for a preliminary injunction and filed its ruling thereon (Reported 346 F.Supp., 376). On July 26, 1972, the court heard defendants' application for a stay of the preliminary injunction and the court thereupon issued a

*Affidavit in Support of Plaintiffs' Motion for
Summary Judgment.*

stay of the injunction to permit one additional performance of the rock opera "JESUS CHRIST SUPERSTAR", upon certain conditions and based upon defendants' representation that only one additional performance had been scheduled by them. Upon information and belief, defendants abandoned the scheduled performance. On August 1, 1972, defendants filed a notice of appeal from the order granting the preliminary injunction and moved for a further stay of the injunction in the Court of Appeals for the Second Circuit, revealing therein that they had more than one scheduled performance. The motion was denied by order of the Court of Appeals for the Second Circuit, dated August 3, 1972, Kaufman, C.J. On May 30, 1973, the Court of Appeals for the Second Circuit heard argument of defendants' appeal and the injunction was affirmed from the bench. An order thereon was entered by the Court of Appeals for the Second Circuit which provides:

"On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it is hereby affirmed on the authority of *Robert Stigwood Group Ltd. v. Sperber*, 457 F.2d 50 (2nd Cir. 1972) and *Robert Stigwood Group Ltd. v. Hurwitz*, 462 F.2d 910 (2nd Cir. 1972). In addition, the argument that the performances fall within the religious works exemption of 17 U.S.C. § 104 is frivolous."

A copy of the order of the Court of Appeals for the Second Circuit is annexed hereto and marked "Exhibit 1".

3. It is respectfully submitted that the following facts fully establish plaintiffs' right to summary judgment herein.

(a) Annexed to the verified complaint and respectively marked "Exhibits 1-6" thereto, are copies of the certificates

*Affidavit in Support of Plaintiffs' Motion for
Summary Judgment.*

of registration of plaintiffs' copyrighted works. Submitted with the affidavit of Peter Brown, sworn to May 4, 1972 and marked Exhibit 10 thereto, is a copy of the original recording of the opera, which reflects the opera as written in its entirety. As this Court said in granting the preliminary injunction herein (346 F.Supp. 378, 380):

"Timothy Rice and Andrew Lloyd Webber created and wrote the musical work entitled Jesus Christ Superstar, a rock opera depicting the last seven days in the life of Christ. The rights in the work (exclusive of 'King Herod's Song'), were assigned to plaintiff Leeds Music Limited, which secured copyrights for the opera as a 'dramatico-musical composition' under 17 U.S.C. § 5(d). After plaintiff Leeds Music Limited assigned the United States copyrights to plaintiff Leeds Music Corporation, the plaintiff Robert Stigwood Group Limited ('Stigwood'), acquired by assignment the professional stage rights to the opera."

* * * * *

"There is no question that the plaintiff Leeds Music Corporation holds the United States copyrights for the opera Jesus Christ Superstar as a 'dramatico-musical composition', and that the plaintiff Stigwood possesses the rights for the stage productions and dramatic presentations."

(b) As the court said in granting plaintiffs' motion for a preliminary injunction (346 F.Supp. at p. 384):

"The defendants have copied in wholesale fashion the lyrics and score, the sequence of songs, and the overall pattern of plaintiffs' rock opera; there is outright plagiarism here, pure and simple."

(c) During the course of the evidentiary hearings on plaintiffs' application for a preliminary injunction, it was

*Affidavit in Support of Plaintiffs' Motion for
Summary Judgment.*

established that defendants performed the rock opera "JESUS CHRIST SUPERSTAR" on at least 58 separate occasions. (Plaintiffs' Exhibit 11, a copy of which is annexed hereto and marked "Exhibit 2".) Annexed hereto and marked "Exhibit 3", is a copy of the initial Investigators Report with respect to two performances of the rock opera "JESUS CHRIST SUPERSTAR" by defendants on July 15 and 17, 1972, respectively. Such performances are not identified on Exhibit 2 annexed hereto. It is undisputed that the advertising for defendants' performances of the rock opera uniformly contained a reference to "JESUS CHRIST SUPERSTAR", the advertising generally identifying the performances as "JESUS CHRIST SUPERSTAR—The Most Moving Story Ever Told—Performed Live And In Concert By The International Rock Opera Company." (Plaintiffs' Exhibit 10—A-O, hearings on Application for Preliminary Injunction.) During the course of the evidentiary hearings on plaintiffs' application for a preliminary injunction, it was stipulated, "That gross ticket sales for performances subsequent to December 1, 1971 amount to approximately \$300,000, and the amount therefrom received by the Contemporary Mission was approximately \$220,000." (Tr., Hearings, p. 353) Defendant O'Reilly testified therein, "I would say that the net proceeds which went into the Contemporary Mission would be somewhere between 60 and 65 percent of the gross money that we received. And then the running expense, in other words, like salaries and things like that we paid out came to approximately 15 percent, and the other between, say, 45 and 50 percent would be money directly going into the Contemporary Mission." (Tr., Hearings, p. 416) It was also established during the course of the evidentiary hearings that defendants and four others are the Contemporary Mission. (Tr., Hearings, p. 334)

*Affidavit in Support of Plaintiffs' Motion for
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(d) Defendants filed their answer herein on June 1, 1972. Defendants essentially deny the allegations of the complaint therein, and allege three affirmative defenses. With respect to the first affirmative defense, that defendants were performing the works in question pursuant to their First Amendment right of free exercise of their religion, this Court said in granting plaintiffs' application for a preliminary injunction, "Insofar as they choose 'to avoid expenditure of time and skill necessary to evolve their own expression, and instead copied the plaintiffs' expression, there can be no First Amendment justification for such copying.'" (346 F.Supp. at p. 384) With respect to the second affirmative defense, that defendants are within the religious and charitable exemption of Section 104 of the Copyright Act (17 U.S.C., § 104), the Court of Appeals for the Second Circuit specifically stated that the argument "is frivolous." (Exhibit 1) With respect to the third affirmative defense, that defendants use of the opera is a "fair use", this Court said, "No case recognized scholar in the field of copyright law, at least to the extent of this Court's knowledge, supports defendants' position." (346 F.Supp. at p. 385)

4. In the answer to the complaint herein, defendant Robert Cassidy denied that he presented and performed, or caused to be performed, the copyrighted musical works of plaintiffs. At the commencement of the hearing on June 2, 1972, on plaintiffs' application for a preliminary injunction herein, said defendant moved to dismiss the complaint against him herein upon the ground that "he has nothing to do with the matter." (Tr., Hearings, p. 155) The affidavit of defendant Cassidy, submitted in support thereof, merely stated that he did not participate in the actual performances of the rock opera "JESUS CHRIST SUPERSTAR".

*Affidavit in Support of Plaintiffs' Motion for
Summary Judgment.*

During the course of the evidentiary hearings it was established that said defendant is a member of the Contemporary Mission (Tr., Hearings, p. 92); that part of the proceeds of the "JESUS CHRIST SUPERSTAR" performances received by defendants were deposited in a savings account jointly owned by said defendant and another member of the Contemporary Mission (Tr., Hearings, pp. 261, 262); that said defendant was one of the members of the Contemporary Mission authorized to sign checks on its Stamford, Connecticut checking account (Tr., Hearings, p. 262); that when other members of the Contemporary Mission were on the road performing "JESUS CHRIST SUPERSTAR", said defendant stayed behind and was in charge of their residence, including depositing monies received from the performances in bank accounts and attending to the mail with respect to the performances (Tr., Hearings, pp. 315, 316); that the determination to utilize "JESUS CHRIST SUPERSTAR" was reached after thorough discussion with the members of the Contemporary Mission, including said defendant (Tr., Hearings, pp. 126, 128); that all of said defendant's needs are supplied by the Contemporary Mission community (Tr., Hearings, p. 118); and that any time a member of the Contemporary Mission needs or wants money, all he does is ask for it (Tr., Hearings, p. 118).

5. In order to avoid unnecessary further proceedings herein, plaintiffs are prepared to accept the minimum statutory award of damages under the Copyright Act as the full extent of their damage recovery herein computed as follows:

The sum of \$15,000 with respect to each separately copyrighted work, based upon the statutory minimum for sixty infringements thereof by the sixty separate performances, totalling the sum of \$90,000 to be

*Affidavit in Support of Plaintiffs' Motion for
Summary Judgment.*

awarded to plaintiffs jointly and severally against said defendants jointly and severally.

In addition to the minimum damage award as aforesaid, this Court should award to plaintiffs jointly and severally, a reasonable attorney's fee. An award of a reasonable attorney's fee is discretionary under the Copyright Act, but invariably granted under similar circumstances, as more fully appears from plaintiffs' memorandum of law submitted in support of this motion. Plaintiffs' asserted a claim of copyright infringements against defendants by written communication from their counsel, dated December 14, 1971. (Tr., Hearings, Exhibit 19) Defendants saw no reason to communicate with plaintiffs' counsel following receipt of the claim letter, but persisted in their organized tour of "JESUS CHRIST SUPERSTAR" performances. (Tr., Hearings, pp. 422, 423)

6. Our firm specializes in copyright and unfair competition litigation. We have been responsible for the entire nationwide enforcement program of plaintiff, The Robert Stigwood Group Limited, with respect to the stage rights in "JESUS CHRIST SUPERSTAR", under the copyrights therein, and have become uniquely experienced in the field of unauthorized stage performances as a result thereof. The rock opera "JESUS CHRIST SUPERSTAR" is one of the most valuable contemporary copyrighted works and defendants threatened to destroy one of the most valuable rights therein through unauthorized performances. As a result of defendants' insistence upon utilizing the rock opera without authorization, it was necessary for us to prepare the verified complaint, the application for a temporary restraining order and preliminary injunction with supporting affidavits, exhibits and memorandum, a supplemental memorandum in support thereof, notice to pro-

*Affidavit in Support of Plaintiffs' Motion for
Summary Judgment.*

duce, trial subpoenas, a reply memorandum, a post-hearing memorandum, detailed interrogatories, a memorandum in opposition to the motion for a stay in this Court, the papers submitted in support of this motion, an affidavit in opposition to the motion for a stay in the Court of Appeals for the Second Circuit, and an answering brief on the appeal based upon review of the record, including 596 pages of hearing transcripts. [All services rendered in the Court of Appeals for the Second Circuit, except review of the record herein, were rendered jointly to plaintiffs herein and to plaintiffs in the co-pending "Tommy" case.] In addition, it was necessary for me to appear before this Court on seven different occasions for the evidentiary hearings and before the Court of Appeals for the Second Circuit for oral argument on the appeal. My associate also appeared on the application for a temporary restraining order and for several of the hearings. A substantial part of the services rendered herein were on an accelerated basis, dictated by the time pressures of the proceedings. We do not keep time sheets for such litigation but charge our clients a fee based upon a consideration of the amount of work we believe will be necessary, the extent to which our expertise is required, the monetary amount involved, the urgency of the matters undertaken and the results achieved. It is necessary for us to estimate from our statements rendered the charges pertinent to this action, as they were included in total charges billed periodically for the entire enforcement program. As a result, to the best of my ability, I believe the charges applicable to our services rendered in the prosecution of this action are not less than \$30,000. In addition, plaintiffs have incurred expenses for the services of local counsel in an amount not yet determined or paid. Under all the circumstances, it is respectfully submitted that the sum of \$30,000 is a reasonable attorney's fee, and

*Affidavit in Support of Plaintiffs' Motion for
Summary Judgment.*

that the amount thereof should be awarded to plaintiffs herein.

7. As more fully appears from the memorandum of law submitted in support of this motion, plaintiffs are entitled to an award of full costs which should be taxed by the Clerk of this Court.

8. The injunction which was entered by this Court and affirmed by the Court of Appeals for the Second Circuit should be made permanent.

9. Subsequent to the affirmance of the preliminary injunction herein by the Court of Appeals for the Second Circuit, I communicated with defendants' counsel to discuss settlement of this action. Annexed hereto and marked "Exhibit 4", is a copy of his written response thereto, advising that he has "been discharged". We have no record of new counsel for defendants being substituted herein. Accordingly, to insure the adequacy of notice of this motion, plaintiffs are serving copies upon defendants and their counsel of record.

WHEREFORE, it is respectfully submitted that there is no genuine issue of a material fact to be tried herein, plaintiffs' motion for summary judgment should be granted in all respects and the award to be made to plaintiffs herein should be in the total amount of \$120,000, representing minimum statutory damages in the amount of \$90,000 and a reasonable attorney's fee in the amount of \$30,000, with costs to be taxed by the Clerk of the Court.

(Sworn to by Robert C. Osterberg, July 31, 1973.)

**Exhibit 1 to Affidavit in Support—Judgment of
Court of Appeals, dated May 30, 1973.**

**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated Term of the United States Court of Appeals
for the Second Circuit, held at the United States Courthouse
in the City of New York, on the Thirtieth day of May one
thousand nine hundred and Seventy-three.

Present: HON. IRVING R. KAUFMAN,

Chief Judge

HON. ROBERT P. ANDERSON,

HON. JAMES L. OAKES,

Circuit Judges.

72—1826

72—1843

The Robert Stigwood Group Limited, Leeds Music Limited
and Leeds Music Corporation,
Plaintiffs-Appellees,

v.

John T. O'Reilly, Jack Coyne and Robert Cassidy,
Defendants-Appellants.

Track Music Inc., Fabulous Music Ltd., and
New Ikon Ltd.,

Plaintiffs-Appellees,

v.

Contemporary Mission, Inc., John T. O'Reilly, Jack Coyne,
Patrick Berkery, Richard Palmese, Joe DeVito and
Dorothy Lerner,

Defendants-Appellants.

*Exhibit 1 to Affidavit in Support—Judgment of
Court of Appeals, dated May 30, 1973.*

Appeal from the United States District Court for the
District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the authority of *Robert Stigwood Group Ltd. v. Sperber*, 457 F.2d 50 (2nd Cir. 1972) and *Robert Stigwood Group Ltd. v. Hurwitz*, 462 F.2d 910 (2nd Cir. 1972). In addition, the argument that the performances fall within the religious works exemption of 17 U.S.C. § 104 is frivolous.

IRVING R. KAUFMAN
Chief Judge

ROBERT P. ANDERSON—(Per)

JAMES L. OAKES—(Per)
Circuit Judges

Exhibit 3 to Affidavit in Support—Investigator's Report of Defendants' Performances Using Copyrighted Works of Plaintiffs.

REPORT OF INVESTIGATION

RE:

INTERNATIONAL ROCK OPERA COMPANY

July 18, 1972

ASSOCIATED INVESTIGATORS
One Thomas Circle, N.W.
Washington, D. C. 20005

638-2939

*Exhibit 3 to Affidavit in Support—Investigator's Report
of Defendants' Performances Using Copyrighted
Works of Plaintiffs.*

This report covers investigative activities on July 15 and 17, 1972. This case involves the International Rock Opera Company which presented live in concert Jesus Christ Superstar, a rock opera, plus the rock opera "Tommy". Performances were given at 7:30 pm on Saturday, July 15, 1972 at the Richmond Mosque, 6 North Laurel Street, Richmond, Virginia, and at 7:30 pm on Monday, July 17, 1972 at the Roanoke Civic Center Auditorium, 710 Williamson Road, Roanoke, Virginia.

Dorothy Lerner, Joe DeVito, Jay Richards and Jim Rast sang the lead roles.

Jesus Christ Superstar

Length: 90 minutes

The performance was in concert style. Neither costumes nor scenery were utilized. The staging of the performance was as follows: (1) a semi-circle of musicians consisting of five electric guitar players, two of whom doubled on trumpets, a full trap set with one drummer, one electric piano and pianist, and one electric organ and organist; (2) a front row with six singers, one of whom played the tambourine and one of whom played the guitar. (See diagram No. 1).

- #1—Male, played guitar, sang as (1) priest I, (2) Pilate, (3) apostle, and (4) chorus
- #2—Male, played tambourine, sang as (1) priest, (2) apostle, (3) guard, and (4) chorus
- #3—Male, no instrument, sang as (1) apostle, (2) priest III, (3) Herod, (4) beggar and (5) chorus
- #4—Female, no instrument, sang as (1) beggar, (2) apostle's woman, (3) woman who accuses Peter, (4) dancer, and (5) chorus

*Exhibit 3 to Affidavit in Support—Investigator's Report
of Defendants' Performances Using Copyrighted
Works of Plaintiffs.*

- #5—Male, played guitar, sang as (1) apostle (2) guard,
(3) Caliphaz, (4) chorus (Father O'Reilly)
- #6—Female, no instrument, sang as (1) Mary Magdel-
ene, (2) apostle's woman, and (3) chorus
- #7—Male, no instrument, sang part as (1) Jesus, (2)
chorus
- #8—Male, played guitar, sang part as (1) Judas (2)
background singer
- #9—Male, guitar player, chorus singer
- #10—Male, guitar player, doubled on trumpet, chorus
singer
- #11—Male, trumpet player, doubled on guitar, chorus
singer
- #12—Male, drummer
- #13—Female, electric organ player, chorus singer
- #14—Female, electric piano player, chorus singer

For the most part, the players were stationary, a few ex-
ceptions were:

1. #8, Judas opened the show on center-front stage
(no instrument, then moved into front line. Later
he moved into the background, got his guitar and
was flexible between front row of singers and back
row of musicians;
2. #3, Herod moved to center front for *Herod's Song*,
danced in center back stage during some choral
numbers;

*Exhibit 3 to Affidavit in Support—Investigator's Report
of Defendants' Performances Using Copyrighted
Works of Plaintiffs.*

3. #4, Female danced in center back stage during some choral numbers;
4. #2, 3, 4, 5 and 6 moved to center back stage as Jesus sings a long aria before he is arrested. They move forward to "Hang on Lord, We're Gonna Fight For You";
5. #7, Jesus moved slightly upstage for the 39 lashes.

Lighting was used to give a strobe-like effect during several numbers. Individual performers were spot-lighted during their solos while the rest of the cast were illuminated by subdued reds, greens and blues. The performers were dressed in jeans (pants) and shirts. Jesus wore jeans and a tie-died shirt. Only exception was #6, Mary Magdelene, who wore a long dress made with a sailor suit top.

Tommy

Length: 65 minutes

This International Rock Opera Company production was performed after Jesus Christ Superstar. This performance, too, was basically in concert style, with no costumes or scenery, yet there was more action on the stage. (See Diagram No. 2)

The performers were as follows:

- #1—Played instrument like synthesizer and sang choral parts
- #2—Guitar player, choral singer
- #3—Guitar player, solo singer as Lover, Hawker, chorus
- #4—Guitar player, solo singer as he sang *Amazing Journey*, Father, and chorus

*Exhibit 3 to Affidavit in Support—Investigator's Report
of Defendants' Performances Using Copyrighted
Works of Plaintiffs.*

- #5—Tambourine player, chorus singer, acted out Kevin while whole cast sing it
- #6—Guitar and trumpet player, chorus singer
- #7—Drummer
- #8—Guitar player, solo singer as Father, local lad, doctor, Sally Simpson and chorus
- #9—Female, solo as Acid Queen, chorus
- #10—Female, solo as Mother, chorus
- #11—Tommy, no instrument
- #12—Male, no instrument, solo as Uncle Ernie, chorus, dances in back; is not on stage until *Fiddle About*;
- #13—
- #13—Electric organ, female singer playing; did not hear organ
- #14—Electric piano, female singer playing

Staging

IT'S A BOY—Beginning: Tommy, #11, who is on the floor, rises during pronouncement of his birth and sits on stool in center front stage.

COUSIN KEVIN—#5 as Cousin Kevin taunts Tommy; rolls him on the floor, tackles him on center front stage.

ACID QUEEN—#9 dances around Tommy singing her song while #10 as Mother, holds his hand.

FIDDLE ABOUT—#12 as Uncle Ernie comes from off stage dressed in short pants and suspenders; he molests and fondles Tommy.

*Exhibit 3 to Affidavit in Support—Investigator's Report
of Defendants' Performances Using Copyrighted
Works of Plaintiffs.*

Costumes

Same dress as in Jesus Christ Superstar with two exceptions: (1) Female who sang Mary Magdelene in Jesus Christ changed from long sailor suit dress to pants suit for her role as Acid Queen and (2) Male who sang various roles in Jesus Christ changed from purple jeans and shirt to light red short pants with suspenders for his role as Uncle Ernie.

Sound

The sound equipment was abundant. A minimum of fifteen microphones were used and several large amplifiers (each being the size of an electric organ), as well as smaller ones, were turned to full volume.

Lighting

The lighting techniques used in Tommy were pretty much the same as those used in Jesus Christ Superstar.

Appearance

Except for two or three males, all performers had long hair. Male #8, Judas, had a full beard and #7, Jesus, had a moustache.

With the exception of #12, the drummer, and #3, a female singer with a full Afro hair-do (both of whom were Black) the cast was made of Caucasians.

Remarks

After the performance, Jim Rast was subsequently interviewed by Investigator. Mr. Rast advised that the leader of the group was a Catholic priest, Father O'Reilly,

*Exhibit 3 to Affidavit in Support—Investigator's Report
of Defendants' Performances Using Copyrighted
Works of Plaintiffs.*

and several members of the International Rock Opera Company were also priests (four in all). The priests were formerly in a group known as "The Missions", folk singers who appeared on several television shows, one of them being the Ed Sullivan Show. The rest of the group were professional musicians according to Mr. Rast. (Father O'Reilly can be contacted at Number 1, Mayapple Road, Stamford, Connecticut.)

For the performance of "Tommy", the International Rock Opera Company followed the libretto verbatim (see attached libretto). Approximately ten minutes of the tape of "Tommy" was not recorded due to mechanical difficulties.

One radio station in the Ronaoke area, Station WROV on Cleveland Avenue, ran spot announcements concerning the shows, but Investigator was unable to obtain the script for this advertisement.

Enclosed with the report are four tickets stubs, tape recordings, newspaper articles, stage diagrams and a separate listing of songs performed during Jesus Christ Superstar.

* * * * *

Sequence of Songs from Jesus Christ Superstar

1. Overture
2. "Heaven On Their Minds"
3. "What's The Buzz"
4. "Strange Thing Mystifying"
5. "This Jesus Must Die"
6. "Hosanna"

*Exhibit 3 to Affidavit in Support—Investigator's Report
of Defendants' Performances Using Copyrighted
Works of Plaintiffs.*

7. "Simon Zealotes"
8. "Poor Jerusalem"
9. "Pilate's Dream"
10. "The Temple"
11. "Everything's Alright"
12. "I Don't Know How To Love Him"
13. "Damned For All Time"
14. "Blood Money"
15. "The Last Supper"
16. "Gethsemane"
17. "The Arrest"
18. "Peter's Denial"
19. "Pilate And Christ"
20. "King Herod's Song"
21. Judas' Death"
22. "Trial Before Pilate" (Including 39 lashes)
23. "Superstar"
24. "Crucifixion"
25. "John Nineteen:Forty-One"
26. Curtain Call: Entire Cast Singing:
 "Heaven On Their Minds"
 "Superstar"
 "Simon Zealotes"

.

**Plaintiffs' Statement of Facts Pursuant to Local Rule
10(a)3 as to Which There Is No Genuine Issue
to Be Tried.**

(Record Document 30)

1. Plaintiffs, respectively, own and control six copyrights in Jesus Christ Superstar, the segments thereof and the rights thereunder, as alleged in the verified complaint herein.
2. Defendants copied in wholesale fashion the lyrics and score, the sequence of songs, and the overall pattern of Jesus Christ Superstar for purposes of public performances.
3. Defendants performed Jesus Christ Superstar on at least sixty separate occasions without any authorization, utilizing the copyrighted material protected by the six copyrights therein.
4. The advertising for defendants' unauthorized performances uniformly contained a reference to Jesus Christ Superstar.
5. Defendants were notified in writing of plaintiffs' claims of infringements of the copyrights in Jesus Christ Superstar by letter dated December 11, 1971.
6. Defendants saw no reason to respond to the written notice of infringement claims, but thereafter persisted in their unauthorized performances.
7. Each of defendants' performances was pursuant to a separately negotiated agreement with a specific auditorium and in conjunction separately arranged advertising with local newspapers and local radio stations.
8. The financial arrangements defendants made with numerous auditoriums varied in terms.

*Plaintiffs' Statement of Facts Pursuant to Local Rule
10(a)3 as to Which There Is No Genuine
Issue to Be Tried.*

9. The content of defendants' performances varied from time to time.

10. The performances were given over a period of several months at different auditoriums in such diverse locations as Connecticut, Maine, New Hampshire, Massachusetts, Delaware, Pennsylvania, Ohio, Virginia, Wisconsin, North Dakota, Iowa, Indiana, New York, Maryland, Rhode Island, Minnesota and Canada.

11. Gross ticket sales for the performances subsequent to December 1, 1971 amount to approximately \$300,000.00 from which defendants received approximately \$220,000.00 and paid out for expenses approximately \$33,000.00, leaving a net balance to defendants in excess of \$185,000.00.

12. Defendants and four others are the Contemporary Mission and the sole parties in interest in Contemporary Mission, Inc.

13. All of defendants' needs are supplied by the Contemporary Mission and any time an individual needs or wants money, he asks for it.

14. Defendant Robert Cassidy is a member of the Contemporary Mission, a joint owner of its bank savings account, and an authorized signatory for its checking account, who was in charge of the Contemporary Mission premises when other members were on the road performing Jesus Christ Superstar, and assumed the responsibility for depositing monies received from the performances, attended to mail with respect to the performances and was a participant in the determination of the Contemporary Mission to utilize Jesus Christ Superstar.

**Affidavit of Defendant John T. O'Reilly, Submitted
in Opposition to Plaintiffs' Motion for Summary
Judgment.**

(Record Document Filed October 9, 1973)

Father John T. O'Reilly, being sworn, deposes and states
as follows:

1. He is an individual defendant in each of the above
cases and is a priest and officer of the Contemporary
Mission.

2. Of my own knowledge I can say that I produced a
concert tour of Jesus Christ Superstar, starting on ap-
proximately December 1, 1971, based on my honest belief
that I was doing nothing for which I might be held liable.
I had a general, non-technical knowledge that Stigwood
was attempting unsuccessfully to prevent persons from
performing concert versions of Superstar; but I believed
then, as I believe now, that his motive in so acting was to
unreasonably hold a performing monopoly on Jesus Christ
Superstar so as to keep alive interest in an upcoming
Broadway show. I also know that before we began our
concert production, Stigwood abandoned such a motive and
organized several road companies for concert perform-
ances of Superstar. Until the Sperber case was announced,
I believed that I had every right to produce and perform
in a concert tour of Jesus Christ Superstar.

3. During this concert tour, which I state was a con-
tinuous tour, which averaged a performance on every third
day during the period of the tour, we generally performed
in small towns. To my knowledge, Stigwood's road shows
had not performed in these towns before our performances
there, and did not attempt to perform there afterwards.

*Affidavit of Defendant John T. O'Reilly, Submitted in
Opposition to Plaintiffs' Motion for Summary Judgment.*

Our performances, for the most part, were held in high school auditoriums or small theaters. I believe that we were not in competition with Stigwood, since to my knowledge, his road shows performed only in larger cities.

4. When the Sperber case was announced in March, 1972, I spoke with several attorneys in Canada and the United States (I should note that notice of a suit against us was served to us in Canada during March, 1972). It was their considered opinion and advice that we were protected by Section 104 of the United States Code, Title 17, and by a similar, even more explicit statute in Canada, both of which provided a religious exemption for certain kinds of performances of copyrighted materials. It was on the advice of our attorneys, therefore, and on my own belief that their advice was sound and rightly described our circumstances in performing a concert version of Jesus Christ Superstar, that I continued to produce and perform in a concert version of Jesus Christ Superstar.

5. In Framingham, Mass., on or about April 29, 1972, I received a telegram from a Mr. Osterberg, an attorney for Stigwood, to the effect that he would sue us if we continued to perform our concert version of Jesus Christ Superstar. I was told, personally and individually by the manager of the theater in which we were to perform our concert, by a manager at the radio station which broadcast our advertisements for the concert, and by a representative of the newspaper which printed our ads, that Osterberg had approached each of them and threatened to sue if they continued to run our ads, or in the case of the theater, to hold our concert there. I told them, as I now firmly assert, that there was no U.S. legal action against us with regard to our concert version of Jesus Christ Superstar, and that

*Affidavit of Defendant John T. O'Reilly, Submitted in
Opposition to Plaintiffs' Motion for Summary Judgment.*

Osterberg had no right whatsoever to threaten them with lawsuits. At least one of these persons told me that Osterberg was in Framingham for at least two days.

6. After learning that Stigwood had obtained a temporary restraining order against us, I stopped the production of our concert tour, and immediately cancelled all engagements that could be cancelled. I also want to note, as strongly as possible, that in his appeal for this temporary restraining order, which appeal is in the record of the Court, Osterberg viciously and cruelly misrepresented me and the other members of the concert group. He stated that we were posing as priests and as a religious order, that we were working out of two post office boxes, and that we were a "fly-by-night" group. I angrily protest Osterberg's tactics in this regard, and state that his representations of our group were false and misleading. Throughout the entire period of our performing of a concert version of Superstar, and throughout the hearings before the Court, I and the other priests who took part in the performance and production of the concert acted as honest, upright individuals. We cooperated with the Court, and voluntarily ceased performances of the concert during the preliminary hearings. At the suggestion of the Court we did not perform any further concerts in Canada, although we were not specifically restricted by any U.S. decree. Before the Court's decision with regard to the hearing, I produced several concerts of Superstar, after our attorney had advised the Court at the end of the hearing that the performances of such concerts would be necessary because of the financial situation of the Contemporary Mission. After the decision, we have not performed or produced any concert programs of Jesus Christ

*Affidavit of Defendant John T. O'Reilly, Submitted in
Opposition to Plaintiffs' Motion for Summary Judgment.*

Superstar at any time or in any place, even though we were permitted by the Court to do one more performance in Duluth. I have no further intention to produce or be involved in any concert productions of Jesus Christ Superstar.

7. I produced and performed in some concert performances of TOMMY in one, continuous tour. I did this upon the advice of my attorneys, who expressed a professional opinion that we were covered by Section 104 of United States Code, Title 17. I also state that these performances, which were done along with the concert production of Jesus Christ Superstar, did not net me as an individual, any of the priests or other performers as individuals, or the Contemporary Mission, any profit or surplus of funds.

Dated: October 4, 1973
New York, New York

**Ruling on Defendant Robert Cassidy's Motion
to Dismiss.**

(Record Document 31)

The defendant, Robert Cassidy, moves to dismiss this action as against him on the ground that he is not a "real party in interest." The Court disagrees.

It is undisputed that Father Cassidy is a member of the Contemporary Mission, a joint owner of its bank savings account, and a signatory for its checking account. He actively participated in the decision which resulted in the unauthorized performances of the rock opera "Jesus Christ Superstar" and, along with the other defendants, personally received and used the funds generated by the infringing acts. Thus, he must be held jointly and severally liable as a "vicarious" or "contributory" infringer. See *Gershwin Publishing Corp. v. Columbia Artists, Man., Inc.*, 44 F.2d 1159, 1161-1163 (2 Cir .1971).

Accordingly, the motion to dismiss filed by the defendant Robert Cassidy is denied.

Dated at New Haven, Connecticut, this 13th day of November, 1974.

ROBERT C. ZAMPANO
United States District Judge

Ruling on Plaintiffs' Motion for Summary Judgment

(Record Document 32)

In this action for copyright infringement, the Court issued a preliminary injunction enjoining the defendants from any unauthorized performance of the rock opera "Jesus Christ Superstar." *Robert Stigwood Group Limited v. O'Reilly*, 346 F.Supp. 376 (D.Conn. 1972). The decision was affirmed from the bench by the Court of Appeals for the Second Circuit. No. 72-1826 (2 Cir. May 25, 1973). The plaintiffs now move for summary judgment, pursuant to the provisions of Rule 56, Fed. R. Civ. P., with respect to their claims for a permanent injunction, statutory damages in the amount of \$90,000, an attorney's fee in the sum of \$30,000, and for their costs.

The underlying facts, fully developed by way of affidavits, moving papers, briefs and an evidentiary hearing which consumed over five days, are set forth in the prior opinion of this Court. As stated in that decision:

The defendants have copied in wholesale fashion the lyrics and score, the sequence of songs, and the overall patterns of plaintiffs' rock opera; there is outright plagiarism here, pure and simple. (citations omitted) 346 F.Supp. at 384.

The defenses of fair use, alleged violations of the First Amendment, and religious exemption under the Copyright Act, 17 U.S.C. § 104, were raised and rejected in this Court and in the Court of Appeals. However, in opposing the instant motion, defendants raise an additional five issues which they contend require a plenary trial.

First, defendants assert that, based on advice of counsel, they believed the plaintiffs had "no legal right to stop" the defendants' performances of the rock opera. But innocent intent and lack of knowledge of infringement are not defenses. *Shapiro, Bernstein & Co. v. H. L. Green Company*, 316 F.2d 304 308-309 (2 Cir. 1963); *Pickwick Music Cor-*

Ruling on Plaintiffs' Motion for Summary Judgment.

poration v. Record Productions, Inc., 292 F.Supp. 39, 41 (S.D.N.Y. 1968); 2 Nimmer, Copyright § 148 (1974).

The defendants next contend that the plaintiffs' lack of "good faith" raises a factual question for trial. Specifically, they argue that the plaintiffs delayed bringing suit and harassed the defendants prior to and during this litigation. Neither of these claims presents a genuine issue of material fact. Plaintiffs instituted this action five months after they learned of the defendants' infringing practices, well within the three-year statute of limitations provided for in 17 U.S.C. § 115(b). The defenses of laches and harassment are factually and legally frivolous. See, e.g., *Kaplan v. Helenhart Novelty Corporation*, 182 F.2d 311, 313-314 (2 Cir. 1950); *Remington Research Inc. v. Modern Aids, Inc.*, 170 F.Supp. 7, 9-10 (S.D.N.Y. 1959); *Szekely v. Eagle Lion Films*, 140 F.Supp. 843, 848-849 (S.D.N.Y. 1956), aff'd 242 F.2d 266 (2 Cir.), cert. denied, 354 U.S. 922 (1957); *Khan v. Leo Feist*, 70 F.Supp. 450, 458-459 (S.D.N.Y.), aff'd 165 F.2d 188 (2 Cir. 1947); cf. *Meeropol v. Nizer*, 361 F.Supp. 1063, 1069 (S.D.N.Y. 1973).

Third, the defendants state that the number of infringing performances may only be established by a trial. It would be a gross waste of judicial time to litigate this issue. The defendants concede that they performed the rock opera at least 50 times; the Court, therefore, accepts this number as its baseline figure for the computation of damages.

The Court further rejects, as a matter of law, the contention that successive performances of "Jesus Christ Superstar" on the same tour constitute one infringing transaction for the purpose of assessing damages. While finding separate infringements in successive publications separated by 26 days, the Supreme Court in *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919), emphasized that some transactions may be regarded as continuing, rather than individual infringements. Application of the principles enunciated in *Westermann* has va-

Ruling on Plaintiffs' Motion for Summary Judgment.

ried. Some decisions, focusing on the time span between the infringing activities, have found a single infringing transaction where the interval between succeeding publications is a matter of days, e.g., *Gordon v. Weir*, 111 F. Supp. 117 (E.D.Mich. 1953), aff'd per curiam 216 F.2d 508 (6 Cir. 1954); *Doll v. Libin*, 17 F.Supp. 546 (D.Mont. 1936); other courts have viewed acts occurring on successive days as separate infringements. *Advertisers Exchange, Inc. v. Bayless Drug Store, Inc.*, 50 F.Supp. 169 (D.N.J. 1943); *Select Theatres v. Ronzoni Macaroni Co.*, 50 U.S.P.Q. 288 (S.D.N.Y. 1943).

Timing is not the only relevant factor. The nature and mode of defendants' business operations must also be considered. *Davis v. E. I. DuPont de Nemours & Company*, 249 F.Supp. 329, 337 (S.D.N.Y. 1966). Proof of new advertising copy or a separate and distinct response to a new order will result in a finding of separate infringements. *Baccaro v. Pisa*, 252 F. Supp. 900 (S.D.N.Y. 1966); *Cory v. Physical Culture Hotel, Inc.*, 14 F.Supp. 977 (W.D.N.Y. 1936), aff'd 88 F.2d 411 (2 Cir. 1937).

Applying these principles to the uncontroverted facts in the instant case, it seems clear that each one of the defendants' performances of the plaintiffs' rock opera constituted a separate infringing transaction. Among other factors, the 50 performances were given over a long period of time in many states as well as in Canada, pursuant to individually negotiated contracts with owners of theaters, auditoriums and schools. At times, the tour consisted of different actors and the content of the performances varied. Separate advertising was placed with local newspapers and radio stations for each event. In sum, each one of the defendants' performances of the rock opera constituted a distinct, unrelated transaction; so, there were multiple infringements of the plaintiffs' work.

Plaintiffs have decided not to seek actual damages as a result of plaintiffs' actions; rather, they request their due

Ruling on Plaintiffs' Motion for Summary Judgment.

"in lieu of actual damages and profits" under the applicable provisions of the Copyright Law, 17 U.S.C. § 101. Thus, an award should reflect "such damages as to the court shall appear to be just." Cf. *Davis v. E. I. DuPont de Nemours & Company*, supra; *Baccaro v. Pisa*, supra.

In calculating damages according to the statutory provisions, the baseline figure of 50 must be reduced by 12, thereby excluding the Canadian performances. See *Nimmer*, supra, § 65.61 and § 156; *American Code Co. v. Bensinger*, 282 F. 829, 833 (2 Cir. 1922). At each of the performances, there were six copyrights owned by the plaintiffs which the defendants wilfully and unlawfully infringed. Under all the circumstances of this case, it is the Court's considered opinion that a fair, reasonable, and just award for damages shall be a total of \$22,800 for defendants' multiple infringements of plaintiffs' rock opera "Jesus Christ Superstar."

The final remaining question concerns the plaintiffs' entitlement to an attorney's fee, which the defendants submit raises an issue of fact which cannot be decided on a motion for summary judgment. The Court disagrees. Under 17 U.S.C. § 116, the matter lies within the sound discretion of the Court. See *Burndy Engineering Co. v. Sheldon Service Corporation*, supra at 663. While not as detailed as they might otherwise be if the issue were litigated at a hearing, the plaintiffs have filed adequate moving papers to furnish a factual basis upon which to make an award. Considering criteria such as amount of time and work done, the skill employed and the result achieved, the sum of \$4,700 is determined to be a reasonable attorney's fee. Cf. *Burnett v. Lambino*, 206 F.Supp. 517, 519 (S.D.N.Y. 1962).

Accordingly, it is hereby ORDERED as follows:

1. The defendants shall pay to the plaintiffs the sum of \$22,800 in damages for infringements of the rock opera "Jesus Christ Superstar";

Judgment.

2. The defendants shall pay to the plaintiffs the sum of \$4,700 as a reasonable attorney's fee.

3. The defendants shall pay the costs of this suit as determined by the Clerk of this Court.

Dated at New Haven, Connecticut, this 12th day of November, 1974.

ROBERT C. ZAMPANO
United States District Judge

Judgment.

(Record Document 33)

This case having come on for consideration on the plaintiffs' Motion for Summary Judgment and the Court having filed its Ruling on Plaintiffs' Motion for Summary Judgment under date of November 13, 1974, granting said motion,

It is accordingly Ordered, Adjudged and Decreed that judgment be and is hereby entered in favor of the plaintiffs, as follows:

1. The defendants shall pay to the plaintiffs the sum of \$22,800 in damages for infringements of the rock opera "Jesus Christ Superstar";

2. The defendants shall pay to the plaintiffs the sum of \$4,700 as a reasonable attorney's fee;

3. The defendants shall pay the costs of this suit as determined by the Clerk of this Court.

Dated at Bridgeport, Connecticut, this 15th day of November, 1974.

SYLVESTER A. MARKOWSKI, Clerk

**Plaintiffs' Motion for Reconsideration of Rulings and
Amendment of Judgment.**

(Record Document 34)

Plaintiffs move this Court for reconsideration of this Court's Rulings on Plaintiffs' Motion for Summary Judgment, filed November 13, 1974, granting plaintiffs' motion for summary judgment herein, and for an amendment of paragraph 1 of the judgment herein, filed November 15, 1974, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, solely upon the following grounds, and in no other respect:

1. It is respectfully submitted that this Court has overlooked so much of plaintiffs' motion for summary judgment as requested, "a permanent injunction with the same injunctive relief as contained in the preliminary injunction entered herein," and that plaintiffs are entitled to such relief pursuant to Section 101(a) of the Copyright Act (17 U.S.C. § 101(a)); and

2. It is respectfully submitted that in said rulings this Court has incorrectly applied the statutory measure of damages specified in Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)), which mandates that the Court award the sum of \$250 for each separate infringement of each copyrighted work of plaintiffs, and the award of the sum of \$22,800 set forth in paragraph 1 of the judgment entered herein upon said rulings does not satisfy the statutory mandate.

WHEREFORE, plaintiffs pray that the Court inquire into this motion, set aside so much of said rulings as limit the statutory award of damages to plaintiffs to the sum of \$22,800, substitute therefor an award to plaintiffs of statutory damages in the amount of \$58,000, pursuant to Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)), amend paragraph 1 of the judgment herein in accordance therewith, and grant to plaintiffs a permanent injunction with

*Ruling on Plaintiffs' Motion for Reconsideration of
Rulings and Amendment of Judgment.*

the same injunctive relief as contained in the preliminary injunction entered herein, pursuant to Section 101(a) of the Copyright Act (17 U.S.C. § 101(a)).

Dated: New York, New York
November 22, 1974

**Ruling on Plaintiffs' Motion for Reconsideration of
Rulings and Amendment of Judgment.**

(Record Document 35)

The plaintiffs having moved this Court to reconsider its Ruling on Plaintiffs' Motion for Summary Judgment filed November 13, 1974, it is hereby Ordered:

1. The motion to amend the judgment to include permanent injunctive relief is granted. The judgment is amended to add the following paragraph:

4. The preliminary injunction issued by this Court on July 24, 1972 is hereby made permanent.

2. The plaintiffs' application to increase the amount of damages from \$22,800 to \$58,000 is denied. Under all the circumstances, the Court is of the opinion that the sum awarded in this case is fair, reasonable, and just. Cf. *Advertisers Exchange v. Hinkley*, 199 F.2d 313 (8 Cir. 1952), cert. denied, 344 U.S. 921 (1953); *Shapiro, Bernstein & Co. v. Bleeker*, 224 F.Supp. 595 (S.D.Cal. 1963), aff'd in part sub nom. *Shapiro, Bernstein & Co. v. 4636 Vermont Ave., Inc.*, 367 F.2d 236 (9 Cir. 1966).

Dated at New Haven, Connecticut, this 18th day of December, 1974.

ROBERT C. ZAMPANO
United States District Judge

Amended Judgment.

(Record Document 36)

This cause having come on for consideration on Plaintiffs' Motion for Reconsideration and the Court having filed its Ruling on Plaintiffs' Motion for Reconsideration under date of December 19, 1974, amending the judgment to include permanent injunctive relief, but denying plaintiffs' application to increase the amount of damages,

It is accordingly Ordered, Adjudged and Decreed that

1. The motion to amend the judgment to include permanent injunctive relief is granted. The judgment is amended to add the following paragraph:

4. The preliminary injunction issued by this Court on July 24, 1972 is hereby made permanent.

2. The plaintiffs' application to increase the amount of damages from \$22,800 to \$58,000 is denied. Under all the circumstances, the Court is of the opinion that the sum awarded in this case is fair, reasonable, and just.

Dated at Bridgeport, Connecticut, this 26th day of December, 1974.

SYLVESTER A. MARKOWSKI, Clerk

Plaintiffs' Notice of Appeal.

(Record Document 37)

NOTICE IS HEREBY GIVEN that plaintiffs in the above identified action hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the amended final judgment entered herein on December 26, 1974, as limited plaintiffs' recovery of statutory damages to the sum of \$22,800 for 38 separate infringements of 6 separately copyrighted works and denied so much of plaintiffs' motion to amend the judgment entered herein on November 15, 1974, to provide for an award of statutory damages in the minimum amount of \$250 for each infringement of each separately copyrighted work pursuant to Section 101(b) of the copyright Act (17 U.S.C. § 101(b)).

Dated: New York, New York
January 20, 1975

Defendants' Notice of Appeal.

(Record Document 38)

NOTICE is hereby given that John T. O'Reilly, Jack Coyne and Robert Cassidy, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 27th day of December, 1974.

January 27, 1975

Relevant Docket Entries.

(Record Document A)

July	21, 1972	Verified Complaint, filed.
July	26, 1972	Hearing on Plaintiffs' Application for Injunction. Injunction granted. Injunction issued is stayed until 8/10/72. (counsel to expedite appeal) ZAMPANO, J.
August	1, 1972	Notice of Appeal, filed by defendants.
June	25, 1973	Attested copy of Judgment of Court of Appeals affirming judgment of District Court received from Clerk, U.S.C.A., and filed. " . . . Judgment of said District Court be and it hereby is affirmed on the authority of Robert Stigwood Group Ltd. v. Sperber, 457 F.2d 50 (2nd Cir. 1972) and Robert Stigwood Group Ltd. v. Hurwitz, 462 F.2d 910 (2nd Cir. 1972) In addition, the argument that the performances fall within the religious works exemption of 17 U.S.C. § 104 is frivolous."
August	1, 1973	Motion for Summary Judgment and Notice of Motion, filed by Plaintiffs.
August	1, 1973	Affidavit in Support of Plaintiffs' Motion for Summary Judgment, filed by plaintiffs.
August	2, 1973	Plaintiffs' Memorandum of Law Submitted in Support of Motion for Summary Judgment, filed.
October	9, 1973	Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment, filed.
October	12, '73	Plaintiffs' Reply Memorandum of Law Submitted in Support of Motion for Summary Judgment, filed.
October	15, '73	Per Motion Calendar of RCZ: Plaintiffs' Motion for Summary Judgment: Decision Reserved.

Relevant Docket Entries.

- October 12, '73 Statement of Facts as to Which Plaintiffs Contend there is no Genuine Issue to be Tried Pursuant to Local Rule 10(a)3, filed.
- December 5, '73 Plaintiffs' Application for Pre-Judgment Remedy, filed.
- December 26, '73 Per Motion Calendar of RCZ: Hearing on Order for Plaintiffs' Application for Pre-Judgment Remedy Decision Reserved. Defendants' Memorandum of Law in Opposition to Plaintiffs' Application for Pre-Judgment Remedy, filed by Defendant John T. O'Reilly.
- November 14, 1974 Rulings on Various Motions to Dismiss, filed and entered. Zampano, J. Deft. Joe DeVito Motion to Dismiss—granted. Deft. Dorothy Lerner Motion to Dismiss—granted. Deft. Contemporary Mission, Inc., Motion to Dismiss—denied.
- November 14, 1974 Ruling on Plaintiffs' Motion for Summary Judgment, filed and entered. Granted. ZAMPANO, J.
- November 26, 1974 JUDGMENT, filed and entered. Judgment entered in favor of the plaintiffs on Plaintiffs' Motion for Summary Judgment; plaintiffs recover of the defendants the sum of \$2,700.00, attorney's fees of \$800.00 and costs of this suit. Further, Deft. Contemporary Mission, Inc.'s Motion to Dismiss is denied; Deft. Joe DeVito's Motion to Dismiss is granted, and Deft. Dorothy Lerner's Motion to Dismiss is granted.
- Nov. 26, '74 Plaintiffs' Motion for Reconsideration of Rulings, filed, together with Notice of Motion.
- Nov. 26, '74 Plaintiffs' Memorandum of Law Submitted in Support of Their Motion for Reconsideration of Rulings on Plaintiffs' Motion for Summary Judgment, filed.

Relevant Docket Entries.

- December 4, 1974 Plaintiffs' Motion to Amend Judgment, filed, together with Notice of Motion.
- Dec. 19, 1974 Ruling on Plaintiffs' Motion for Reconsideration, filed and entered. Motion to amend the judgment to include permanent injunctive relief is granted. The judgment is amended to add: "The preliminary injunction issued by this Court on July 26, 1972 is hereby made permanent." Plaintiffs' application to increase the amount of damages from \$2,700 to \$13,500 is denied. Zampano, J.
- December 26, 1974 Amended Judgment, filed and entered. Ordered, Adjudged and Decreed that 1. The Motion to amend the judgment to include permanent injunctive relief is *granted*. The judgment is amended to add the following sentence: The preliminary injunction issued by this Court on July 26, 1972 is hereby made permanent. 2. The plaintiffs' application to increase the amount of damages from \$2,700 to \$13,500 is denied. Under all the circumstances, the Court is of the opinion that the sum awarded in this case is fair, reasonable and just.
- January 23, 1975 Notice of Appeal, filed by plaintiffs.
- January 27, 1975 Notice of Appeal from final judgment, filed by defendants.

Verified Complaint.

(Record Document 1)

Plaintiffs, by their attorneys, Clancy, Kenny & Ford, respectively allege:

FIRST CLAIM

1. This claim arises under the Act of March 4, 1909 c. 320, 35 Stat. 1075, et seq., Title 17 Federal Copyright Act, U.S.C. Section 1, et seq., and the amendments thereto, as codified and enacted into positive law by the Act of July 30, 1947, c. 391, 61 Stat. 652, and the amendments thereto, and the Act of June 25, 1948, c. 646, 62 Stat. 931, Title 28 U.S.C. Sections 1338(a) and (b), as hereinafter more fully appears.

2. Plaintiff Track Music, Inc. (hereinafter referred to as "TRACK") is a corporation duly organized and existing under the laws of the State of New York.

3. Plaintiff Fabulous Music Ltd. (hereinafter referred to as "FABULOUS") is a corporation duly organized and existing under the laws of the United Kingdom.

4. Plaintiff New Ikon Ltd. (hereinafter referred to as "IKON") is a corporation duly organized and existing under the laws of the United Kingdom.

5. Upon information and belief, defendant Contemporary Missior, Inc. is a corporation formed under the laws of the State of Missouri, as a general not for profit corporation, but is no longer in good standing in the State of Missouri for failure to comply with pertinent disclosure laws.

6. Upon information and belief, defendants John T. O'Reilly, Jack Coyne, Patrick Berkery, and Richard

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Palmese reside in this district, collectively utilize, from time to time, the names "Contemporary Mission" and "John O'Reilly Associates" and, together with defendants Joe Devito and Dorothy Lerner, are presenting professional stage productions under the assumed name "International Rock Opera Company."

7. Prior to July 31, 1969, Peter Townshend, Roger Daltrey, John Entwistle and Keith Moon, collectively, professionally known as "The Who", and Christopher Lambert, who then were and ever since have been, citizens of the United Kingdom, created and wrote an original dramatico-musical work entitled "Tommy", a rock opera.

8. Said dramatico-musical work consists of dramatico-musical material wholly original with said Peter Townshend, Roger Daltrey, John Entwistle, Keith Moon and Christopher Lambert, including story line and character designation, as well as the portions thereof written by said Peter Townshend, respectively entitled, "Tommy", "OVERTURE", "IT'S A BOY", "YOU DIDN'T HEAR IT (1921)", "AMAZING JOURNEY", "SPARKS", "CHRISTMAS". "THE ACID QUEEN", "UNDERTURE", "DO YOU THINK IT'S ALRIGHT", "PIN BALL WIZARD", "THERE'S A DOCTOR (I'VE FOUND)", "GO TO THE MIRROR BOY", "TOMMY, CAN YOU HEAR ME?", "SMASH THE MIRROR", "SENSATION", "MIRACLE CURE", "SALLY SIMPSON", "I'M FREE", "WELCOME", "TOMMY'S HOLIDAY CAMP", "WE'RE NOT GONNA TAKE IT", and "SEE ME, FEEL ME"; the portions thereof written by said John Entwistle, respectively entitled, "COUSIN KEVIN" and "FIDDLE ABOUT"; and the portion thereof written by said Keith Moon, entitled "TOMMY'S HOLIDAY CAMP"; and is copyrightable subject matter under the laws of the United States.

9. Prior to July 31, 1969, said Peter Townshend, Roger Daltrey, John Entwistle, Keith Moon and Christopher

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Lambert, duly assigned to plaintiff Track, a music publisher, said dramatico-musical work entitled "TOMMY", and the right to secure copyright therefor in the name of said plaintiff.

10. Prior to July 31, 1969, said Peter Townshend duly assigned to plaintiff Fabulous, a music publisher, the separately entitled portions of said dramatico-musical work entitled "TOMMY" written solely by him, and the right to secure copyright therefor in the name of said plaintiff.

11. Prior to July 31, 1969, said John Entwistle duly assigned to plaintiff Ikon, a music publisher, the separately entitled portions of said dramatico-musical work written solely by him, and the right to secure copyright therefor in the name of said plaintiff.

12. Prior to July 31, 1969, said Keith Moon duly assigned to plaintiff Ikon, a music publisher, the separately entitled portion of said dramatico-musical work written solely by him, and the right to secure copyright therefor in the name of said plaintiff.

13. At all times pertinent hereto, plaintiffs, respectively, duly complied in all respects with the said Act of March 4, 1909, and the amendments thereto, known as the Copyright Law, and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyrights in said dramatico-musical work, and the said separately entitled portions thereof, and respectively received from the Register of Copyrights certificates of registration thereof, dated and identified as follows:

Plaintiff TRACK

1. "TOMMY", the dramatico-musical work, published July 31, 1969, "Class D, No. Dp 7966, Oct. 20, 1971."

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Plaintiff FABULOUS

2. "TOMMY", from the rock opera, published July 31, 1969, "Class E, Ep 261465, Aug. 4, 1969."
3. "OVERTURE", from the rock opera, published July 31, 1969, "Class E, Ep 261466, Aug. 4, 1969."
4. "It's A BOY", from the rock opera, published July 31, 1969, "Class E, Ep 261467, Aug. 4, 1969."
5. "YOU DIDN'T HEAR IT (1921)", from the rock opera, published July 31, 1969, "Class E, Ep 261468, Aug. 4, 1969."
6. "AMAZING JOURNEY", from the rock opera, published July 31, 1969, "Class E, Ep 261469, Aug. 4, 1969."
7. "SPARKS", from the rock opera, published July 31, 1969, "Class E, Ep 261470, Aug. 4, 1969."
8. "CHRISTMAS", from the rock opera, published July 31, 1969, "Class E, Ep 261471, Aug. 4, 1969."
9. "THE ACID QUEEN", from the rock opera, published July 31, 1969, "Class E, Ep 261473, Aug. 4, 1969."
10. "UNDERTURE", from the rock opera, published July 31, 1969, "Class E, Ep 261474, Aug. 4, 1969."
11. "DO YOU THINK IT'S ALRIGHT?", from the rock opera, published July 31, 1969, "Class E, Ep 261475, Aug. 4, 1969."
12. "PINBALL WIZARD", from the rock opera, "Class E, Eu 109526, Apr. 3, 1969."
13. "PINBALL WIZARD", from the rock opera, published April 22, 1969, "Class E, Ep 259150, Aug. 4, 1969."

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14. "THERE'S A DOCTOR (I'VE FOUND)", from the rock opera, published July 31, 1969, "Class E, Ep 261477, Aug. 4, 1969."
15. "GO TO THE MIRROR BOY", from the rock opera, published July 31, 1969, "Class E, Ep 261478, Aug. 4, 1969."
16. "TOMMY CAN YOU HEAR ME?", from the rock opera, published July 31, 1969, "Class E, Ep 261479, Aug. 4, 1969."
17. "SMASH THE MIRROR", from the rock opera, published July 31, 1969, "Class E, Ep 261480, Aug. 4, 1969."
18. "SENSATION", from the rock opera, published July 31, 1969, "Class E, Ep 261481, Aug. 4, 1969."
19. "MIRACLE CURE", from the rock opera, published July 31, 1969, "Class E, Ep 261482, Aug. 4, 1969."
20. "SALLY SIMPSON", from the rock opera, published July 31, 1969, "Class E, Ep 261483, Aug. 4, 1969."
21. "I'M FREE", from the rock opera, published July 31, 1969, "Class E, Ep 261484, Aug. 4, 1969."
22. "WELCOME", from the rock opera, published July 31, 1969, "Class E, Ep 261485, Aug. 4, 1969."
23. "WE'RE NOT GONNA TAKE IT", from the rock opera, published July 31, 1969, "Class E, Ep 261487, Aug. 4, 1969."
24. "SEE ME, FEEL ME (Finale from 'WE'RE NOT GONNA TAKE IT')", from the rock opera, published October 21, 1970, "Class E, Ep 279648, Nov. 16, 1970."

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Plaintiff IKON

25. "COUSIN KEVIN", from the rock opera, published July 31, 1969, "Class E, Ep 261472, Aug. 4, 1969."

26. "FIDDLE ABOUT", from the rock opera, published July 31, 1969, "Class E, Ep 261476, Aug. 4, 1969."

27. "TOMMY'S HOLIDAY CAMP", from the rock opera, published July 31, 1969, "Class E, Ep 261486, Aug. 4, 1969."

14. Annexed hereto and marked, respectively, Exhibits 1-27, are true copies of said certificates of registration.

15. Prior to July 1, 1972, plaintiffs Fabulous and Ikon duly assigned to plaintiff Track the rights for the United States under their respective said copyrights in the separately entitled portions of said dramatico-musical work entitled "TOMMY".

16. At all times relevant hereto, plaintiffs have duly complied with all of the pertinent provisions of the Copyright Law, and all other laws governing copyright.

17. At all times subsequent to July 1, 1972, plaintiffs Track, Fabulous and Ikon have been and still are, respectively, the sole proprietors of all rights, title and interest in and to the copyrights in said dramatico-musical work and all separately entitled portions thereof; and plaintiff Track has been and still is possessed of all rights under said copyrights of plaintiffs Fabulous and Ikon for the United States.

18. After July 1, 1972, defendants presented and publicly performed for profit, caused to be presented and publicly performed for profit, are preparing to present and

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publicly perform for profit, and cause to be presented and publicly performed for profit, and intend to present and publicly perform for profit, and cause to be presented and publicly performed for profit, in various parts of the United States, the separately entitled portions of said dramatico-musical work entitled "TOMMY", in direct violation of the copyrights of plaintiffs Fabulous and Ikon and the rights of plaintiff Track thereunder.

19. By reason of the foregoing, the defendants are infringing the respective copyrights in the separately entitled portions of said dramatico-musical work entitled "TOMMY", and interfering with the said rights of plaintiff Track thereunder.

20. Plaintiffs have notified defendants in writing that their public performances of the separately entitled portions of said dramatico-musical work entitled "TOMMY", will infringe said copyrights, and interfere with said rights of plaintiff Track, and defendants have refused to discontinue their unlawful acts.

21. Upon information and belief, defendants are without funds to satisfy any judgment in favor of plaintiffs herein and are transferring, disbursing, releasing and paying to others the monies received by them from their unauthorized uses of said copyrighted works.

22. Plaintiffs have no adequate remedy at law.

SECOND CLAIM

23. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1." through "22." of this verified complaint.

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24. After July 1, 1972, defendants presented and publicly performed, caused to be presented and publicly performed, are preparing to present and publicly perform, and intend to present and publicly perform, and cause to be presented and publicly performed, a dramatic presentation of said copyrighted dramatico-musical work entitled "TOMMY", in direct violation of the copyright of plaintiff Track therein, and the right to dramatize the separately entitled portions thereof under the copyrights in the separately entitled portions thereof.

25. By reason of the foregoing, defendants are infringing the copyright of plaintiff Track in said dramatico-musical work entitled "TOMMY"; the copyrights of plaintiffs Fabulous and Ikon in the separately entitled portions thereof; and the rights of plaintiff Track under the copyrights in the separately entitled portions thereof.

THIRD CLAIM

26. Plaintiffs repeat and reallege each and every allegation contained in paragraphs "1." through "25." of this complaint. Jurisdiction also arises under Title 28 U.S.C. § 1338(b).

27. Plaintiffs have engaged in the widespread exploitation of the rights under the copyrights in said dramatico-musical work, and various separately entitled portions thereof, including through sales of more than 2 million complete recordings of a recorded performance by "The Who" of said dramatico-musical work entitled "TOMMY", made and sold by MCA Records, Inc. under the label name "DECCA"; through sales of printed folio editions thereof at numerous music outlets; through the presentation in the United States of various authorized dramatic stage per-

Verified Complaint.

formances of said dramatico-musical work entitled "TOMMY", including at The Metropolitan Opera House in New York City, Tanglewood Music Festival in Lenox, Massachusetts, and Cleveland Music Hall, all performed by "The Who"; through prolonged performances in Seattle, Washington, and Los Angeles, California, respectively performed by "The Seattle Opera Co." and "Aquarius Theatre"; and through repeated tour engagements by "Les Grands Ballets Canadiens" at various locations.

28. By reason of the widespread exploitation of said dramatico-musical work, and the enormous public interest therein, authorized productions of said dramatico-musical work, including its separately entitled portions, have become collectively known in the trade and to the public as "TOMMY", or "The Rock Opera, 'TOMMY'", whereby such titles have acquired secondary meaning prior to July 1, 1972.

29. Subsequent to July 1, 1972, defendants adopted, and engaged in promoting, producing, advertising and scheduling public performances of said dramatico-musical work under the titles "TOMMY" and "The Rock Opera, 'TOMMY'", to create a false impression of authority from plaintiffs and confuse the public, thereby engaging in unfair trade practices and unfair competition against plaintiffs to plaintiffs' irreparable damage.

WHEREFORE, plaintiffs demand:

[1] That each of defendants, their agents and servants, and all parties acting in concert with defendants, be enjoined during the pendency of this action and permanently (1) from directly or indirectly (a) infringing the copyrights of plaintiffs identified in the verified complaint herein, and interfering with the rights of plaintiff Track under

Verified Complaint.

the copyrights of Fabulous and Iken in any manner; (b) publicly performing, contracting for, promoting, advertising, publicizing, contributing to, furthering, participating in or in any way aiding, assisting or abetting public performances of the copyrighted works identified in the verified complaint herein, or any segment thereof; (c) utilizing, or permitting the use of, any advertisements, publicity or representations which refer to "TOMMY", or "The Rock Opera, 'TOMMY'", or any variation thereof, directly or indirectly, in conjunction with any public performances or productions of said copyrighted works, or any segment thereof; (d) publicly performing, or presenting any public performances, whenever the advertising or publicity therefor refers to "TOMMY", or "The Rock Opera, 'TOMMY'", or any variation thereof; and (e) transferring, disbursing, releasing, paying, or permitting the transfer, disbursements, release or payment of any monies received from, or payable for, public performances comprehending any uses of the copyrighted works identified in the complaint herein, except by depositing the same with the Clerk of this Court, and (2) by directing defendants to deposit with the Clerk of this Court, upon the service of a copy hereof, all monies received from any public performances comprehending any use of the copyrighted works identified in the verified complaint herein and, in the event defendants thereafter receive or control the right to receive any such monies, to deposit such monies with the Clerk of this Court, promptly following the receipt thereof, or the creation of the right to control the receipt thereof.

[2] That each of defendants be required (a) to account respectively, for all gains, profits and advantages derived by defendants from each of their acts of unfair trade practice and copyright infringement; (b) to pay to plaintiffs such damages as plaintiffs have sustained in consequence

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of each of defendants' infringements of each of said copyrights, or such damages as to the Court shall appear proper within the provisions of the Copyright Law, and (c) to pay to plaintiffs such damages as plaintiffs have suffered as a result of each of defendants' unfair trade practices.

[3] That each of defendants be required to deliver up to be impounded during the pendency of this action, all copies of said copyrighted works, or any part thereof, intended for use or used in public performances thereof; all advertising, promotional items or other material referring to such public performances and all other means for presenting infringing public performances of said dramatico-musical work or any portion thereof.

[4] That defendants pay to plaintiffs the cost of this action, including a reasonable attorney's fee to be allowed to plaintiffs by the Court, pursuant to § 116 of the Copyright Law.

[5] That plaintiffs have such other and further relief as to the Court may seem just.

[Exhibits 1-27 are copies of the certificates of copyright registration referred to in the verified complaint]

Plaintiffs' Motion for Summary Judgment.

(Record Document 11)

Upon the annexed affidavit of Robert C. Osterberg, plaintiffs move this Court for an order, pursuant to Rule 26 of the Federal Rules of Civil Procedure, granting summary judgment in favor of plaintiffs and against defendants Contemporary Mission Inc., John T. O'Reilly, Jack Coyne, Patrick Berkery and Richard Palmese, awarding plaintiffs (a) statutory damages in the total amount of \$13,500, pursuant to Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)), (b) the costs of this action, including a reasonable attorney's fee in the amount of \$12,500, pursuant to Section 116 of the Copyright Act (17 U.S.C. § 116); and (c) a permanent injunction with the same injunctive relief as contained in the preliminary injunction entered herein, pursuant to Section 101(a) of the Copyright Act (17 U.S.C. § 101(a)); all on the ground that there is no genuine issue as to any material fact concerning the liability of said defendants herein, and that plaintiffs are entitled to a judgment against said defendants as aforesaid as a matter of law.

Dated: New York, New York
July 17, 1973

**Affidavit in Support of Plaintiffs' Motion for
Summary Judgment.**

(Record Document 12)

ROBERT C. OSTERBERG, being duly sworn, deposes and says:

1. I am a partner in the New York City law firm of Abeles Clark and Osterberg, and an attorney for plaintiffs herein. This affidavit is submitted in support of plaintiffs' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, including an award of reasonable attorney's fees pursuant to Section 116 of the Copyright Act (17 U.S.C., § 116). It is respectfully submitted that, as hereinafter more fully appears, there is no genuine issue of any material fact and plaintiffs are entitled to judgment as a matter of law.

2. This action is for copyright infringement arising out of the unauthorized uses of 27 separately copyrighted works in public performances of the rock opera entitled "TOMMY". Annexed hereto and marked "Exhibit 1", is a copy of the docket sheet on file in this case. As more fully appears therefrom, defendants Contemporary Mission Inc., John T. O'Reilly, Jack Coyne, Patrick Berkery and Richard Palmese (hereinafter referred to as "Said Defendants") were served with process herein and appeared through counsel. Defendants Joe DeVito and Dorothy Lerner have not been served herein, whereby this motion is not addressed to them. It is anticipated that if summary judgment is granted in favor of plaintiffs, the action will be dismissed against defendants Joe DeVito and Dorothy Lerner.

3. As more fully appears from "Exhibit 1", prior to July 26, 1972 Said Defendants filed no answer to the veri-

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Summary Judgment.*

fied complaint herein. According to our files, no answer has been filed by Said Defendants subsequent to July 26, 1972.

4. The action was commenced by the filing of the verified complaint on July 21, 1972, together with an application for a temporary restraining order and preliminary injunction, supported by the affidavit of Paul Schwartz, sworn to July 20, 1972. The hearing of plaintiffs' application was continued to July 26, 1972, at which time Said Defendants appeared in opposition thereto, and the court granted plaintiffs' application for a preliminary injunction. Annexed hereto and marked "Exhibit 2", is a copy of the pertinent portion of the transcript of the hearing comprehending the ruling of this Court granting the preliminary injunction. During the course of the hearing, the Court also issued a stay of the injunction to permit one additional performance of the rock opera "TOMMY" upon certain conditions and based upon Said Defendants' representation that only one additional performance had been scheduled by them. Upon information and belief, Said Defendants abandoned the scheduled performance. On August 1, 1972 Said Defendants filed a notice of appeal from the order granting the preliminary injunction and moved for a further stay of the injunction in the Court of Appeals for the Second Circuit revealing that they had more than one scheduled performance and seeking a stay during the pendency of the appeal. The motion was denied by order of the Court of Appeals for the Second Circuit dated August 3, 1972, Kaufman, C.J. On May 25, 1973, the Court of Appeals for the Second Circuit heard argument of Said Defendants' appeal and the injunction was affirmed from the bench. An order thereon was entered by the Court of Appeals for the Second Circuit which

*Affidavit in Support of Plaintiffs' Motion for
Summary Judgment.*

provides:

"On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it is hereby affirmed on the authority of *Robert Stigwood Group Ltd. v. Sperber*, 457 F.2d 50 (2nd Cir. 1972) and *Robert Stigwood Group Ltd. v. Hurwitz*, 462 F. 2d 910 (2nd Cir. 1972) In addition, the argument that the performances fall within the religious works exemption of 17 U.S.C. § 104 is frivolous."

A copy of the order of the Court of Appeals for the Second Circuit is annexed hereto and marked "Exhibit 3".

5. It is respectfully submitted that the following facts fully establish plaintiffs' right to summary judgment herein.

(a) Annexed to the verified complaint and respectively marked "Exhibits 1-27" thereto, are copies of the certificates of registration of plaintiffs' copyrighted works. Submitted with the affidavit of Paul Schwartz, sworn to July 20, 1972 and marked Exhibit II thereto, is a copy of the folio edition which reflects a true copy of each of plaintiffs' copyrighted works. As this Court said in granting the preliminary injunction herein:

"On the title question, I feel the moving papers submitted by counsel are sufficient to lead me to the conclusion that on that issue the plaintiffs would probably succeed at trial and for the reasons stated by plaintiffs' counsel during argument, I find all issues raised on that question in favor of the plaintiffs." [Exhibit 2, Tr. p. 61]

(b) Annexed hereto and marked "Exhibit 4", is a copy of the Investigators Report with respect to two perform-

*Affidavit in Support of Plaintiffs' Motion for
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ances of the rock opera "TOMMY" by Said Defendants on July 15 and 17, 1972, respectively, a copy of which was annexed to the affidavit of Robert L. Miller, sworn to July 18, 1972, and submitted in support of plaintiffs' application for a preliminary injunction herein. As more fully appears therefrom, "For the performances of 'Tommy', the International Rock Opera Company followed the libretto verbatim (see attached libretto)." [Exhibit 4, p. 6]

(c) As more fully appears from this Court's ruling on the application for a preliminary injunction,

"The three defenses raised by the defendants are governed by my rulings in Superstar and I incorporate by reference thereto those rulings in the Track matter." [Exhibit 2, Tr., p. 61]

The rulings in the Superstar case referred to are reported in 346 F.Supp. at pp. 376 et seq. With respect to the first defense that Said Defendants are within the religious and charitable exemption of Section 104 of the Copyright Act (17 U.S.C., § 104), the Court of Appeals for the Second Circuit specifically stated that the argument "is frivolous." With respect to the second defense that Said Defendants were exercising their rights to free speech and the free exercise of their religion, this Court said "Insofar as they choose 'to avoid the expenditure of time and skill necessary to evolve their own expression, and instead copied the plaintiffs' expression, there can be no first amendment justification for such copying'." [346 F.Supp. at p. 384] With respect to the third defense that the use made of the opera is a "fair use", this Court said, "No case or recognized scholar in the field of copyright law, at least to the extent of this Court's knowledge, supports Defendants' position." [346 F.Supp. at p. 385]

*Affidavit in Support of Plaintiffs' Motion for
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6. In order to avoid unnecessary further proceedings herein, plaintiffs are prepared to accept the minimum statutory award of damages under the Copyright Act as the full extent of their damage recovery herein computed as follows:

The sum of \$500 with respect to each separately copyrighted work, based upon the statutory minimum for two infringements thereof by the two separate performances, totalling the sum of \$13,500 to be awarded to plaintiffs jointly and severally against Said Defendants jointly and severally.

In addition to the minimum damage award as aforesaid, this Court should award to plaintiffs jointly and severally, a reasonable attorney's fee. An award of a reasonable attorney's fee is discretionary under the Copyright Act, but invariably granted under similar circumstances, as more fully appears from plaintiffs' memorandum of law submitted in support of this motion. As set forth in the affidavit of Paul Schwartz, sworn to July 20, 1972, and submitted in support of the application for a preliminary injunction, defendant John T. O'Reilly attempted to obtain a license for performances of the rock opera "Tommy" in June 1972 and was advised that the rights thereto would not be available until after 1972; prior to the institution of this action, Said Defendants were notified by telegram dated July 13, 1972, that the scheduled performances would infringe plaintiffs' copyrights; and Said Defendants, nevertheless, willfully proceeded with the infringing performances.

7. Our firm specializes in copyright and unfair competition litigation. We have been responsible for the entire nationwide enforcement program of the copyright owners of the pertinent rights in Jesus Christ Superstar,

*Affidavit in Support of Plaintiffs' Motion for
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and have become uniquely experienced in the field of unauthorized stage performances as a result thereof. The rock opera "TOMMY" is one of the most valuable contemporary copyrighted works and Said Defendants threatened to destroy one of the most valuable rights therein through unauthorized performances. As a result of Said Defendants' insistence upon utilizing the rock opera without authorization, it was necessary for us to prepare the verified complaint, the application for a temporary restraining order and preliminary injunction with supporting affidavits and exhibits, and memorandum, the papers submitted in support of this motion, an affidavit in opposition to the motion for a stay in the Court of Appeals for the Second Circuit, and an answering brief on the appeal. [All services rendered in the Court of Appeals for the Second Circuit were rendered jointly to plaintiffs herein and to plaintiffs in the co-pending "Jesus Christ Superstar" case.] In addition, it was necessary for me to appear before this Court for oral argument on the application of plaintiffs' injunction and before the Court of Appeals for the Second Circuit for oral argument on the appeal. We do not keep time sheets for such litigation but charge our clients a fee based upon a consideration of the amount of work we believe will be necessary, the extent to which our expertise is required, the monetary amount involved and the results achieved. To date, plaintiffs have been billed and paid to us the sum of \$12,500 for our services rendered in the prosecution of this action. In addition, plaintiffs have incurred expenses for the services of local counsel in an amount not yet determined or paid. Under all the circumstances, it is respectfully submitted that the sum of \$12,500 is a reasonable attorney's fee, and that the amount thereof should be awarded to plaintiffs herein.

*Affidavit in Support of Plaintiffs' Motion for
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8. As more fully appears from the memorandum of law submitted herewith, plaintiffs are entitled to an award of full costs which should be taxed by the Clerk of this Court.

9. The injunction which was entered by this Court and affirmed by the Court of Appeals for the Second Circuit should be made permanent.

10. Subsequent to the affirmance of the preliminary injunction herein by the Court of Appeals for the Second Circuit, I communicated with Said Defendants' counsel to discuss settlement of this action. Annexed hereto and marked "Exhibit 5", is a copy of his written response thereto, advising that he has "been discharged." We have no record of new counsel for Said Defendants being substituted herein and it is fundamental that a corporation can appear only by an attorney. Accordingly, to insure the adequacy of notice of this motion, plaintiffs are serving copies upon Said Defendants and their counsel of record.

WHEREFORE, it is respectfully submitted that there is no genuine issue of a material fact to be tried herein, plaintiffs' motion for summary judgment should be granted in all respects and the award to be made to plaintiffs herein should be in the total amount of \$26,000, representing minimum statutory damages in the amount of \$13,500 and a reasonable attorney's fee in the amount of \$12,500, with costs to be taxed by the Clerk of the Court.

s/ ROBERT C. OSTERBERG

Exhibit 3 to Affidavit in Support—Judgment of Court of Appeals, dated May 30, 1973, Affirming Judgment Entering Preliminary Injunction.

(Same as Exhibit 3 to Affidavit in Support of Motion for Summary Judgment in Stigwood Action, *supra*, p. 24.)

Exhibit 4 to Affidavit in Support—Investigator's Report of Defendants' Performances Using Copyrighted Works of Plaintiffs.

(Same as Exhibit 3 to Affidavit in Support of Motion for Summary Judgment in Stigwood Action, *supra*, p. 26.)

**Plaintiffs' Statement of Facts Pursuant to Local Rule
10(a)3 as to Which There Is No Genuine Issue
to Be Tried.**

(Record Document 14)

1. Plaintiffs, respectively, own and control twenty-seven separate copyrights in Tommy, the segments thereof and the rights thereunder, as alleged in the verified complaint herein.
2. Defendants copied in wholesale fashion the lyrics and score, the sequence of songs, and the overall pattern of plaintiffs' rock opera for public performances thereof.
3. Defendants served no answer to the complaint herein.
4. In June 1972 defendant O'Reilly requested a license to use Tommy and was advised such license would not be granted and the rights would not be available until after 1972.
5. Defendants were notified in writing of plaintiffs' infringement claims by telegram dated July 13, 1972.
6. Defendants performed the rock opera Tommy on July 15, 1972 at Richmond, Virginia and on July 17, 1972 at Roanoke, Virginia without any authorization.
7. Defendants' performances were conducted pursuant to a separately negotiated agreement with the specific auditoriums and in conjunction therewith separately arranged local advertising therefor.
8. Defendants and others are the Contemporary Mission and the sole parties in interest in Contemporary Mission Inc.

*Plaintiffs' Statement of Facts Pursuant to Local Rule
10(a)3 as to Which There Is No Genuine
Issue to Be Tried.*

9. All of the needs of the members of the Contemporary Mission are supplied by Contemporary Mission Inc. and any time an individual needs or wants money, he asks for it.

10. The use of Tommy was approved by the members of the Contemporary Mission as a community, and the uses of Tommy were conducted as part of the activities of Contemporary Mission Inc. which received the proceeds therefrom.

**Affidavit of Defendant John T. O'Reilly, Submitted in
Opposition to Motion for Summary Judgment**

(Record Document filed October 9, 1973)

(Same as affidavit submitted in opposition to motion for Summary Judgment in the Stigwood Case, *supra*, p. 36.)

**Rulings on Motions to Dismiss of Contemporary
Mission, Inc., Joe DeVito and Dorothy Lerner.**

(Record Document 18)

The motion to dismiss filed by the defendant Contemporary Mission, Inc. is denied.

The motion to dismiss filed by the defendant Joe DeVito is granted.

The motion to dismiss filed by the defendant Dorothy Lerner is granted.

Dated at New Haven, Connecticut, this 13th day of November, 1974.

ROBERT C. ZAMPANO
United States District Judge

Rulings on Plaintiffs' Motion for Summary Judgment.

(Record Document 19)

In this action for copyright infringement, this Court issued a preliminary injunction on July 26, 1972, enjoining the defendants from any unauthorized performance of the rock opera "Tommy" and its 27 separately copyrighted works. See also *Robert Stigwood Group Limited v. O'Reilly*, 346 F.Supp. 376 (D.Conn. 1972). The ruling was affirmed from the bench by the Court of Appeals for the Second Circuit. No. 72-1826 (2 Cir. May 25, 1973). The plaintiffs now move for summary judgment, pursuant to the provisions of Rule 56, Fed. R. Civ. P., with respect to their claims for a permanent injunction, statutory damages in the amount of \$13,500, reasonable attorney's fee, and for their costs.

FINDINGS OF FACT

1. The plaintiffs are the owners of 27 copyrights on various musical compositions in the rock opera "Tommy."
2. In June 1972, the defendants sought a license to perform "Tommy," which request was denied.
3. Defendants were notified in writing of plaintiffs' infringement claims by telegram in early July, 1972.
4. Thereafter defendants performed the rock opera "Tommy" on July 15, 1972 at Richmond, Virginia, and on July 17, 1972 at Roanoke, Virginia, without authorization. In these performances, defendants copied verbatim the lyrics and score, the sequence of songs, and the overall pattern of plaintiffs' rock opera.
5. Each of the performances were conducted pursuant to separately negotiated contracts with the owners of the theaters in question. Local advertising was utilized in both locations. Each of the infringing performance was an unrelated, distinct business transaction.

Rulings on Plaintiffs' Motion for Summary Judgment.

6. The defenses raised to the plaintiffs' motion for summary judgment were considered and rejected by this Court in its Ruling On Plaintiffs' Motion For Summary Judgment, dated November 12, 1974, in the companion case, *The Robert Stigwood Group Limited v. O'Reilly*, Civil No. B-501.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter in controversy.
2. Plaintiffs are the owners of at least 27 copyrights in the rock opera "Tommy."
3. Each of the defendants' two performances of the rock opera "Tommy" were unauthorized and constituted wilful infringements of the plaintiffs' copyrights.
4. Under all the circumstances of this case, it is the Court's considered opinion that a fair, reasonable, and just award for damages shall be a total of \$2700.00 for defendants' multiple infringements of plaintiffs' rock opera "Tommy."
5. In addition, plaintiffs are entitled to \$800.00 reasonable attorney's fees.
6. The defendants shall pay the costs of this suit as determined by the Clerk of this Court.

Dated at New Haven, Connecticut, this 13th day of November, 1974.

ROBERT C. ZAMPANO
United States District Judge

Judgment.

(Record Document 20)

This case having come on for consideration on the Plaintiffs' Motion for Summary Judgment and the Defendants' various Motions to Dismiss and the Court having filed under date of November 14, 1974, its Ruling on Plaintiffs' Motion for Summary Judgment, granting said motion and its Rulings on various Motions to Dismiss, wherein the Defendant, Contemporary Mission, Inc.'s motion was denied, Defendant, Joe DeVito's motion was granted, and the Defendant, Dorothy Lerner's motion was granted,

It is accordingly ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the plaintiffs on Plaintiffs' Motion for Summary Judgment and that the plaintiffs recover of the defendants the sum of \$2,700.00, attorney's fees of \$800.00 and costs of this suit.

It is further ORDERED, ADJUDGED and DECREED that the Defendant, Contemporary Mission, Inc.'s Motion to Dismiss is denied; Defendant, Joe DeVito's Motion to Dismiss is granted, and Defendant, Dorothy Lerner's Motion to Dismiss is granted.

Dated at Bridgeport, Connecticut, this 26th day of November, 1974.

SYLVESTER A. MARKOWSKI
Clerk

Plaintiffs' Motion for Reconsideration of Rulings.

(Record Document 21)

Plaintiffs' move this court for reconsideration of this court's Ruling on Plaintiffs' Motion for Summary Judgment, filed November 14, 1974, granting plaintiffs' motion for summary judgment herein, solely upon the following grounds, and in no other respect:

1. It is respectfully submitted that this court has overlooked so much of plaintiffs' motion for summary judgment as requested, "a permanent injunction with the same injunctive relief as contained in the preliminary injunction entered herein," and that plaintiffs' are entitled to such relief pursuant to Section 101(a) of the Copyright Act (17 U.S.C. § 101(a)); and

2. It is respectfully submitted that in Conclusion of Law "4." contained in said rulings, this court has incorrectly applied the statutory measure of damages specified in Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)) which mandates that the court award the sum of \$250 for each separate infringement of each copyrighted work of plaintiffs.

WHEREFORE, plaintiffs pray that the court inquire into this motion, set aside so much of its Conclusion of Law "4." contained in said rulings as limits the statutory award of damages to plaintiffs to the sum of \$2,700, and substitute therefor an award to plaintiffs of statutory damages in the amount of \$13,500, pursuant to Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)), and grant to plaintiffs a permanent injunction with the same injunctive relief as contained in the preliminary injunction entered herein, pursuant to Section 101(a) of the Copyright Act (17 U.S.C. § 101(a)).

Dated: New York, New York
November 22, 1974

Plaintiffs' Motion to Amend Judgment.

(Record Document 22)

Plaintiffs move this Court, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, for amendment of the judgment herein filed on November 26, 1974, solely upon the following grounds, and in no other respect:

1. The sum of \$2,700.00 awarded to plaintiffs as statutory damages should be deleted and the sum of \$13,500.00 should be inserted in lieu thereof, for the reasons set forth in plaintiffs' Motion for Reconsideration of this Court's Rulings on Plaintiffs' Motion for Summary Judgment, which motion was served herein by plaintiffs on November 22, 1974.

2. Plaintiffs should be awarded a permanent injunction with the same injunctive relief as contained in the preliminary injunction entered herein, pursuant to Section 101(a) of the Copyright Act (17 U.S.C. § 101(a)), for the reasons set forth in plaintiffs' said Motion for Reconsideration of this Court's Rulings on Plaintiffs' Motion for Summary Judgment.

The Court is respectfully referred to plaintiffs' said Motion for Reconsideration of this Court's Rulings on Plaintiffs' Motion for Summary Judgment and the Memorandum of Law submitted in support thereof, all of which are relied upon by plaintiffs in support of this motion.

WHEREFORE, plaintiffs' pray that the Court amend the judgment herein in accordance with plaintiffs' Motion for Reconsideration of this Court's Rulings on Plaintiffs' Motion for Summary Judgment granting to plaintiffs a permanent injunction with the same injunctive relief as contained in the preliminary injunction entered herein, pursuant to Section 101(a) of the Copyright Act (17 U.S.C. § 101(a)), and awarding to plaintiffs statutory damages in the amount of \$13,500.00 pursuant to Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)).

Dated: New York, New York
December 2, 1974

**Ruling on Plaintiffs' Motions for Reconsideration of
Rulings and to Amend Judgment.**

(Record Document 23)

The plaintiffs having moved this Court to reconsider its Ruling on Plaintiffs' Motion for Summary Judgment filed November 14, 1974, it is hereby Ordered:

1. The motion to amend the judgment to include permanent injunctive relief is granted. The judgment is amended to add the following sentence:

The preliminary injunction issued by this Court on July 26, 1972 is hereby made permanent.

2. The plaintiffs' application to increase the amount of damages from \$2,700 to \$13,500 is denied. Under all the circumstances, the Court is of the opinion that the sum awarded in this case is fair, reasonable, and just. Cf. *Advertisers Exchange v. Hinkley*, 199 F.2d 313 (8 Cir. 1952), cert. denied, 344 U.S. 921 (1953); *Shapiro, Bernstein & Co. v. Bleeker*, 224 F.Supp. 595 (S.D.Cal. 1963), aff'd in part sub nom. *Shapiro, Bernstein & Co. v. 4636 Vermont Ave., Inc.*, 367 F.2d 236 (9 Cir. 1966).

Dated at New Haven, Connecticut, this 18th day of December, 1974.

ROBERT C. ZAMPANO
United States District Judge

Amended Judgment.

(Record Document 24)

This cause having come on for consideration on Plaintiffs' Motion for Reconsideration and the Court having filed its Ruling on Plaintiffs' Motion for Reconsideration under date of December 19, 1974, amending the judgment to include permanent injunctive relief, but denying plaintiffs' application to increase the amount of damages,

It is accordingly ORDERED, ADJUDGED and DECREED that

1. The motion to amend the judgment to include permanent injunctive relief is granted. The judgment is amended to add the following sentence:

The preliminary injunction issued by this Court on July 26, 1972 is hereby made permanent.

2. The plaintiffs' application to increase the amount of damages from \$2,700 to \$13,500 is denied. Under all the circumstances, the Court is of the opinion that the sum awarded in this case is fair, reasonable, and just.

Dated at Bridgeport, Connecticut, this 26th day of December, 1974.

SYLVESTER A. MARKOWSKI, Clerk

Plaintiffs' Notice of Appeal.

(Record Document 25)

NOTICE IS HEREBY GIVEN that plaintiffs in the above identified action hereby appeal to the United States Court of Appeals for the Second Circuit from so much of the amended final judgment entered herein on December 26, 1974, as limited plaintiffs' recovery of statutory damages to the sum of \$2,700 for 2 separate infringements of 27 separately copyrighted works and denied so much of plaintiffs' motion to amend the judgment entered herein on November 26, 1974, to provide for an award of statutory damages in the minimum amount of \$250 for each infringement of each separately copyrighted work pursuant to Section 101(b) of the Copyright Act (17 U.S.C. § 101(b)).

Dated: New York, New York
January 20, 1975

Defendants' Notice of Appeal.

NOTICE is hereby given that Contemporary Mission, Inc., John T. O'Reilly, Jack Coyne, Patrick Berkery and Richard Palmese, defendants above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 27th day of December, 1974.

January 27, 1975

In the
United States Court of Appeals
For The Second Circuit

75-7376-7

Robert Stigwood Group Limited, et al.,
Plaintiffs-Appellants, Cross-Appellees,
v.
W. O'Reilly, Jack Coyne and Robert Cassidy,
Defendants-Appellees, Cross-Appellants.

Music, Inc., Fabulous Music Ltd. and New Iken, Ltd.,
Plaintiffs-Appellants, Cross-Appellees,
v.

**AFFIDAVIT
OF SERVICE
BY MAIL**

Temporary Mission, Inc., John T. O'Reilly, Jack Coyne,
Trick Berkey, Richard Palmese, Joe De Vito, and
Cathy Lerner,
Defendants-Appellees, Cross-Appellants.

E OF NEW YORK,
TY OF NEW YORK, ss.:

Esposito, being duly sworn, deposes and says that he
over the age of 18 years, is not a party to the action, and resides
State Street, Valley Stream, New York.
On April 17, 1975, he served 2 copies of
and Appendix

William D. O'Reilly, Esq.,
52 Sharon Road,
Windham, New Hampshire, 03087

depositing the same, properly enclosed in a securely-sealed,
-paid wrapper, in a Branch Post Office regularly maintained by
United States Government at 350 Canal Street, Borough of Manhattan,
of New York, addressed as above shown.

..... *Charles Esposito*

to before me this
thday of April, 1975

John V. Depina
JOHN V. DE PINA
Notary Public in and for the State of New York

County of New York
Commission Expires March 31, 1977